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General Editor
MAHAMAHOPADHYAYA
Dr. UMESHA MISHRA, M.A., D. Litt.

MĪMĀMSĀ JURISPRUDENCE

(THE SOURCE OF HINDU LAW)

BY
A.S. NATARAJA AYYAR M.A., M.L.



GANGANATHA JHA RESEARCH INSTITUTE
ALLAHABAD
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Foreword to Second Edition

The present Campus was first established as THE GANGANATHA JHA RESEARCH INSTITUTE in 1943. To perpetuate the memory of late Sir Ganganatha Jha the Institute was named after him.

Sir Ganganatha Jha was a renowned Meemamsa scholar. The institute made it a point to encourage scholars working in the field of Meemamsa, the fond subject of Sir Ganganatha Jha.

In that direction the work by A.S. Nataraja Ayyar, "Meemamsa Jurisprudence" (The sources of Hindu Law) was taken up for publication. It was published in 1952, more than half a century back. It was a sought after text by the members of the legal fraternity. It went out of print in 70s itself.

Taking the necessity of the subject in view, its reprint is brought out now. Paying tributes to late Sir Ganganatha Jha we well remember the services of Dr. Umesh Mishra, the founder secretary of the Research Institute, A.S. Nataraja Ayyar, the author and Sri Har Govind Misra, who bore the cost of printing the text during those days.

Goparaju Rama
Principal

FOREWORD

It is a source of great pleasure to me, as the Secretary of the Ganganatha Jha Research Institute and also as the teacher under whose guidance the author of the present work has worked for more than five years, to place in the hands of the scholarly world the first part of "Mimamsa Jurisprudence and Mimamsa Rules of Interpretation."

The Institute has been founded in the memory of the great Mimamsa scholar, the late Mahamahopadhyaya Dr. Sir Ganganatha Jha who was responsible *inter alia* for the revival of the study of the Mimamsa Śastra in northern India. It was, therefore, thought proper to award the first research scholarship of the Ganganatha Jha Research Institute for researches in Mimamsa. Ours being an All-India Research Institute it was considered not to restrict the award of the scholarship to any particular province. Thus Sri A. S. Nataraja Ayyar, M.A., M.L., was found a fit candidate for carrying on researches in Mimamsa under the Institute. He worked on the subject for more than three years and submitted his thesis for scrutiny. Dr. Sir S. Varadachariar, the external scrutinizer, was kind enough to go through the thesis and gave a good opinion on the work. The work could not be published earlier for want of sufficient funds available for the purpose. High class research works are not generally published for any financial gain. It is only to encourage serious scholars and help the seekers after knowledge that munificent patrons of learning and scholarship come forward to help the publication of such works. That serious scholarship has always found shelter under generous donors needs no mention. The Institute is very grateful to Sir Har Govind Misra of Kanpur who has kindly met the cost of printing the first part of the work. He is a Life-member of the Institute and by his action has shown the way to other members to advance the cause of Sanskrit learning in general and of the Institute in particular by such help.

It is expected that Dr. Sir S. Varadachariar would be writing a detailed foreword as and when all the parts of the work are published.

As to the worth and utility of the part now published I do not want to add anything myself but I leave it to the sound judgment of the impartial readers.

With this brief foreword I conclude and I want only to express the hope that the rest of the work will be published soon and that generous donors will encourage the Institute with their patronage in this and other ways.

Ganganatha Jha Research Institute
Allahabad, 7th July, 1952.

UMESHA MISHRA

PREFACE

The importance of the Mimamsa Śastra in the study of the works on Dharma Śastra has been accepted from very early times. "In fact the principles of Mimamsa form the very background of our Dharma Śastra. All the rules of our Dharma Śastra have to be interpreted with the help of the Mimamsa Nyayas. So a Dharma Śastrin has necessarily to become a Mimamsaka first. Thus almost all the writers on Dharma Śastra from Manu down to the present day have been good Mimamsakas also." (Page 5 *Critical Bibliography of Mimamsa* by Mm. Dr. Umesha Mishra—appended to Mm. Dr. Sir Ganganatha Jha's *Purva Mimamsa in its sources*, 1942. Banaras Hindu University).

Without being charged parochial, I, as a Maithila, should take pride in the contribution of the Maithilas *inter alia* to Mimamsa and Dharma Śastra. Some facts noted by Mm. Dr. Umesha Mishra in his *Critical Bibliography* would tend to make even Śabara, the Bhaṣyakara, who is regarded as the "Father of the Mimamsa Śastra" and Kumarila the greatest Mimamsa Vartikakara as Maithilas. Anyhow one is on sure ground in tracing Mandana Miśra, who disputed with the great Śankara, to be a Maithila. Tradition and research affirm that Vacaspati Miśra I, the renowned author of the *Bhamati* on Śankara's *Brahma-Sutra Bhaṣya*, was an inhabitant of Mithila; his well known Mimamsa work is the commentary on *Vidhi-Viveka* known as *Nyaya-Kanika*. In the *Tattva-Bindu*, an independent work of his, Vacaspati Miśra I discusses the processes of Śabda-bodha according to the various schools and he himself closely follows the viewpoint of the Bhatta School.

Mm. Dr. Umesha Mishra states that "in Mithila the study of Purva Mimamsa reached its zenith in the 14th and 15th centuries. During the reign of Rani Viśvasavati Devi, the wife of Raja Padma Sinha, younger brother of Raja Śiva Sinha, the

patron of Vidyapati Thakkura, there was a big gathering of Pandits in the Catuścarana Yajna (चातुश्चरणयज्ञ) where as many as 1400 Mimamsakas alone were invited; and a list of the names of the scholars so invited has been recently unearthed from the private collection of a Pandita in Mithila." (vide p. 48 Dr. Umesha Mishra's *Critical Bibliography*). These and other facts await the future historian who would be writing a complete political, social, religious and cultural history of Mithila.

Finally we come to Mm. Dr. Sir Ganganatha Jha who is accepted as the greatest Mimamsaka of modern times. He translated the *Śabara Bhaṣya* in three volumes for the Gaekwad Oriental Series. Kumarila's *Śloka Vartika* (श्लोकवार्तिक) *and Tantra Vartika* (तन्त्रवार्तिक) were translated by him; and the Royal Asiatic Society of Bengal, Calcutta published the same in 1909 and 1924. Mm. Dr. Gopinath Kaviraj writing the foreword to the *Tantra Vartika* translation states that it has been the result of a laborious and sustained work carried on through over 25 years commencing from 1896. Mm. Ganganatha Jha wrote his D. Litt. thesis in 1909 on "*The Prabhakara School of Mimamsa*" and this has now been superseded by his *magnum opus* "*The Purva Mimamsa in its sources*" published in 1942 by the Banaras Hindu University. In Sanskrit he has written a very easy and lucid commentary called *Mimamsa Mandana* on the *Mimamsanukramanika* of Mandana Miśra.

The contributions of Sir Ganganatha Jha to the study of Hindu Law are equally great. He has edited Medhatithi's *Bhaṣya* on the *Manu Smriti* for the Royal Asiatic Society of Bengal; and translated the said *Bhaṣya* in 8 volumes for the Calcutta University. He translated Vachaspati Miśra II's *Vivada Chintamani* for the Gaekwad Oriental Series. He wrote his "*Hindu Law in its Sources*" in two volumes.

It would be unnecessary to instance how the world of scholarship has been benefited by the labours of Mm. Dr. Sir Ganganatha Jha. In the well-known case of the validity of the adoption of an only son decided by the Privy Council, the Mimamsa rule

relating to texts containing a prohibition and reasons for the same came in for discussion. The meaning and discussion of the rule as given by Dr. Ganganatha Jha was accepted in the 10th edition of Mayne's *Hindu Law* revised by S. Srinivasa Ayyangar, Advocate-General of Madras who also warmly acknowledged his revision of Mayne being made easy by works like the *Medhatithi Bhaṣya* translation and "*Hindu Law in its sources*" of Dr. Sir Ganganatha Jha.

It is now my duty to bring to the notice of the world of scholars how a handsome tribute was paid to Dr. Ganganatha Jha by their Lordships of the Patna High Court—Reuben and Narayan JJ. the Bench of two Judges of the Patna High Court in 1949, I. L. R. 28 Patna 1008 = 1950 A. I. R. Patna 194. The question arose about the correct interpretation of a passage in Vachaspati's (II) *Vivada Chintamani*. Golap Chandra Sarkar Sastri's Hindu Law (8th edition edited by Rishindra Nath Sarkar) contained one view.

The Judges in accepting Mm. Dr. Sir Ganganatha Jha's translation of the passage in preference to that of Sarkar state :—

"A distinguished scholar of recent times Dr. Sir Ganganatha Jha, Kt., M.A., D.Litt., LL.D., Vidyasagar, Mahamahopadhyaya has translated the Vivada Chintamani of Vachaspati Mishra and his translation does not at all support the view which Mr. Gopal Chandra Sarkar has taken. I have noted all the titles which had been conferred on Dr. Ganganatha Jha with a view to show his position in life and the recognition which he has received as a scholar. He was a Maithila Brahmana, who died only recently (17th Nov., 1941)."

About the utility of the Mimamsa Śastra the same learned Judges state:—

"Anybody who is acquainted with the fortunes of Hindu Law would at once agree that the duty of interpreting the Hindu Law was always in the hands of Brahmins who were fully conversant with that law and those learned Brahmins in order that

their decisions might carry weight were bound to follow fixed principles of interpretations deriving those principles of interpretation from the highest authority on the subject, the Mimamsa Sutras. Mimamsa always looks to the words alone for their meaning and the Mimamsa system is identical with the judicial principles of Interpretation. The fundamental rule of interpretation which we apply in the case of a Statute is to be applied even in interpreting these Sutras and just as a Statute is to be expounded 'according to the intent of those that made it' the Sutras have also to be expounded in a like manner."

It is in the fitness of things that the Institute started in commemoration of the scholarship of Dr. Ganganatha Jha should have chosen "The Mimamsa Rules of Interpretation as applied to Hindu Law in Courts" as the subject of research by its first Research Scholar. Sri A. S. Nataraja Ayyar is a Master of Laws (in Hindu Law) and is a Master of Arts (in Sanskrit with Mimamsa and Vedanta as optional subjects)—of the Madras University. He has produced the thesis on the subject during his tenure as a Research Scholar of the *Ganganatha Jha Research Institute* (July 1946 to December 1949). The thesis has been scrutinized by Sir S. Varadachariar, Retired Judge, Federal Court, and now Chairman, Income Tax Investigation Commission and he has been pleased to give a good report on the same (vide proceedings of the Annual Meeting of the Ganganatha Jha Research Institute published in Vol. VII, page 328 of the Journal of the Ganganatha Jha Research Institute).

I am extremely happy that I have borne the cost of printing the first portion of the said work entitled "Mimamsa Jurisprudence. The Sources of Hindu Law" especially as the same may be read as a text-book on "The Sources of Hindu Law" by the LL.B. and LL.M. students.

Kanpur: 7-7-1952
Vyasa Purnima.

HAR GOVIND MISRA

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INTRODUCTION

The Mimamsa Śastra has for its definite purpose the investigation, examination, consideration, analysis and exposition of the doctrines underlying the Brahmana and the Mantra portions of the Vedas. The Vedanta Śastra, similarly, deals with the Upaniṣadic portion of the Vedas. In this way, the contents of the entire Vedic Literature are summarised in two words—Dharma and Brahman (धर्म and ब्रह्म). Dharma is the subject matter of the Brahmana and Mantra portions of the Vedas in its essence and ब्रह्म is the subject matter of the Upaniṣadic portions. Jaimini systematised the exposition of Dharma and is the author of the Sutras styled as the Purva Mimamsa Sutras. Badarayana or Vyasa systematised the exposition of ब्रह्म in the Sutras known as the Vedànta Sutras. Internal evidence of the two Sutras establishes that Jaimini and Badarayana should have been the most illustrious of a long line of Acharyas and schools of thought working at both the systems. In course of time the Śastra founded by Jaimini was known as the Purva Mimamsa Śastra and that founded by Badarayana was known as the Vedanta Śastra. Further, internal evidence of the two Sūtra works reveals Jaimini and Badarayana as contemporaries; and some special views of Jaimini (as for example, the one relating to the place and position of the Sannyasa Áśrama according to Jaimini) are more to be found in the Badarayana Sutras and in the Śankara Bhaṣya.

H. Jacobi places the composition of the Mimamsa Sutras (and the contemporary completion of the Vedanta or Brahma Sutras) between A. D. 200 and 450.[1]

After the systematisation and exposition of the Purva Mimamsa Śastra in the form of Sutras, we come to the next great landmark in the Bhaṣya of Śabaraswamin. Then we come to the Vartika of Kumarila Bhatta an elder contemporary of Śankara and the commentary by Prabhakara. With these three names is associated the greatness of the Mimamsa Śastra. This period may be styled as the creative or original period of the Mimaṁsa Śastra.

After this creative period of Mimamsa Literature, the subsequent works may be classified into two classes :—

(*i*) The first dealing with the Adhikaranas of the Mimamsa Śastra, in their order. The chief works of this

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1 *Journal of the American Oriental Society*, Vol. XXXI, p. 1. R. Garbe's article on Mimamsa in the Encyclopaedia of Religion and Ethics, Vol. VIII.

type are Parthasarathi Miśra's *Śastra Dipika*, Vidyaranya alias Madhavacharya's *Nyaya-mala-Vistara* and Khanda Deva's *Bhatta Dipika*.

(*ii*) The second dealing with the general substance of the Mimamsa Śastra in a new classified way. To this class may be assigned the *Apadevi*, *Artha-Sangraha* and the *Mimamsa-Paribhaśa*.

It would be necessary to give a bird's eye-view of the contents of this great Śastra. It deals with धर्म as is clear from its very first Sutra.[2] The second sutra[3] deals with the definition of Dharma. That which is indicated or defined by the Vedic injunction as conducive to welfare is Dharma i.e., Dharma is what is enjoined in the Vedas and is conducive to desirable results. Dharma here stands in the wide sense of what may be styled as Duty.

Jaimini has divided this Śastra into twelve Adhyayas and sixty padas and there are about a thousand Adhikaranas which make the Śastra styled as द्वादशलक्षणी and सहस्राधिकरणी.

The whole of the first Adhyaya is devoted to a criticial analysis of the Sources of Dharma and their reliability. By the time that Jaimini came to systematise the Sutras, two other sources of Dharma, besides the Vedas, came to be recognised as such viz., the Smriti and Sadachara; and the place and relation of the three sources, their rank, gradation and rules of acceptance in case of conflict were formulated in the first Adhyaya. Along with this, the definition of Dharma being indicated as चोदना and चोदना having been described by Śabara as that which enjoins one to do the act,[4] i.e., an injunction (positive and negative) it fell to the duty of the Mimamsakas to analyse the other types found in the Vedas as Mantras, Arthavadas and Namadheyas. The meaning and scope of these three types in the Veda and their relation to the चोदना of the Vedas represented by the विधि and the प्रतिषेध had to be discussed.

Thus the first Adhyaya at the hands of Jaimini, Śabara, Kumarila and Prabhakara really grew into a science of the sources of Dharma. In western parlance Jurisprudence is the Science of Law and the first Adhyaya of the Purva Mimamsa Sutras represents the jurisprudence of the sources of Dharma in the Mimamsa Śastra. With this portion of the Mimamsa Śastra and especially with the place of Smriti and Sadachara as sources of Dharma and the inter-relation between the two we are more immediately concerned and hence I have attempted to place the

2 अथातो धर्मजिज्ञासा Jaimini I. i-1.

3 चोदनालक्षणोऽर्थो धर्मः Jaimini I. i-2.

4 चोदना इति क्रियायाः प्रवर्तकं वचनम् आहुः *Śabara Bhaṣya* on I. i-2.

chapters concerning these under the style of "*Mimamsa Jurisprudence—The Sources of Hindu Law.*"

While examining the Vedas as the means and that as the only reliable means of knowing Dharma, the Mimamsaka examined in the first Adhyaya itself the sources of knowledge in its various phases. The six means of knowledge are arranged as **प्रत्यक्ष, अनुमान, शब्द, उपमान, अर्थापत्ति,** and **अनुपलब्धि.** The discussions about these six ways of knowing, their place, importance and function in imparting knowledge grew practically into a Śastra by itself now styled in western philosophical parlance as Epistemology. The Mimamsa discussions on this branch were so accurate and thorough that the Vedantin practically accepted them with a little variation so much so that the maxim arose in the Vedanta Śastra व्यवहारे भट्टनयः. With this philosophical side of the Mimamsa Śastra we are not immediately concerned.

The Mimamsa Śastra in the next eleven Adhyayas may be divided into two separate groups: Adhyayas 2 to 6 and Adhyayas 7 to 12. After having dealt with the means of knowing Dharma in Adhyaya I, Jaimini devotes Adhyaya II to answer the question—what are the acts that constitute Dharma. It is necessary to consider what enjoined acts are primary and what acts are secondary. Before dealing with these, the Sutras deal with the question of the distinguishing mark which differentiates one action from another i.e., the question of Apurva or transcendental effect resulting from them. The question of the principal and auxiliary among acts leads to the formulation of fundamental tests. These are six: Śruti or direct assertion (in the Veda), Linga or word-power, Vakya or syntactical connection, Prakarana or context, Krama (or Sthana) or order of sequence and Samakhya or name. This portion is one of the best expositions of the Mimamsa Śastra where the six rules are described and the rules in cases of conflict among them are stated. This in general may be said to occupy Adhyayas I to III.

In Adhyaya IV we deal with the motive of an action; and all acts are divided into क्रत्वर्थ and पुरुषार्थ acts. In this is discussed the very important question of the means of the acquisition of wealth and their purpose, secular or religious. Adhyaya V deals with the order in which acts should be done and the rules governing the same. Adhyaya VI deals with the Sacrificer—the character and qualifications of the Performer. This closes the study of the first six Adhyayas of the Sutras which discusses generally the procedure of the Darśa-Paurnamasa and other sacrifices the details of which have been directly prescribed in the Vedas.

The latter six Adhyayas VII to XII discuss the procedure of the Aindragni and such other sacrifices the details of which have not been enjoined. अतिदेश or Transference is that process by which the details prescribed in connection with one sacrifice are extended beyond the sacrifice and transferred to another. In this second group of six Adhyayas are also considered rules governing ऊह or modification, बाध or exclusion, तन्त्र or centralisation, प्रसङ्ग or extended application and विकल्प or option.

The rules discussed in Adhyayas II to XII may be divided into four heads :—

(1) Some of the rules discussed directly partake of the immediate needs of the performance of Śrauta sacrifice and may appear to be a Śrauta Sutra in a general form. We are not immediately concerned with this.

(2) Many, if not almost every one of the rules described are of a general character and are capable of a general and extended use. For example, a sentence is defined and discussed—whether a sentence constitutes the words composing it or is anything more; and the rules of interpretation governing words and sentences are discussed elaborately and the conclusions laid down with great precision. The rules of Ekavakyata and Vakyabheda and such other discussions besides being of a general character bear the mark of a freshness that age does not dim; and many of the rules of Jaimini in this respect have anticipated the modern philological discussions. It is this portion dealing with the Rules of Interpretation which is usually styled as "*The Mimamsa Rules of Interpretation.*"

"The laws of interpretation formulated by Jaimini and his successors are quite general and they are applicable to works outside the Veda as to that ancient text. They have, in fact, become widely current and are utilised for arriving at right interpretation of all old texts, particularly legal treatises (Dharma Śastra)."[5]

This portion of the Mimamsa Śastra has been practically bodily incorporated in the appropriate places in the Dharma Śastra texts—the Smritis and more especially in the commentaries and in the Nibandhas or Digests of Hindu Law. Similarly the Vedanta also in its discussions has adopted these Mimamsa Rules of Interpretation. Badarayana's Vedanta Sutras contain internal evidence of the use of Jaimini's *Nyayas*. Śankara in his Brahma Sutra Bhaṣya has profusely used the Nyayas to his advantage and later commentators on the Vedanta are no exception to this rule. The use and influence of the Mimamsa on the Dharma Śastra and Vedanta are very well known.

5 Hiriyanna's *Outlines of Indian Philosophy*, Page 299.

(3) Incidentally we have in Adhyayas II to XII discussions about Apurva and the existence of Devatas. In this branch alone the Mimamsa Śastra has been entirely superseded by the Vedanta Śastra. The Devatas do not exist only in the Mantras when they are uttered as per the doctrine of the Mimamsaka but the five-fold existence of the Devata, his existence or form, his bhoga, his property, his being pleased and his favouring the worshippers are proved to exist in the Vedanta Śastra.[6] As these relate to the belief of the millions and as the philosophical basis given to the eixstence of God and the Devata has completely captured the minds of the millions and as these ideas of the Vedantin live as the believing creeds of today, I have dealt with these in a special part entitled "*Mimamsa Jurisprudence—The Juristic Personality of Deities.*"

(4) Again from several passages in the Mimamsa Śastra we get their fundamental ideas relating to the fundamentals of law as—Marriage, Sonship, Women and their right to property, Property and its nature and acquisition, King and his right to the soil, the relation of the Aśramas especially Married life and Sannyasa and the meaning of a Vedic command including a prohibition. These have a permanent place in the legal system of the Hindus. I have collected these into a separate part styled "*Mimamsa Jurisprudence—The Fundamentals of Mimamsa.*" These would correspond to the Elements or Fundamentals of Law dealt with in modern works on Jurisprudence like Salmond.

Thus, the Mimamsa Śastra which is of immediate practical use has been dealt with by me in four parts :—

I. Mimamsa Jurisprudence—The Sources of Hindu Law.
II. Mimamsa Jurisprudence—The Juristic Personality of Deities.
III. Mimamsa Jurisprudence—The Fundamentals of Mimamsa.
IV. Mimamsa Rules of Interpretation with illustrative cases from the Law Reports.

The two chief doctrines of the Mimamsa Śastra regarding the Vedas are: (*i*) the स्वतःप्रामाण्य and (*ii*) the अपौरुषेयत्व of the Vedas.

(*i*) "Truth is its own guarantee. Cognitions are by themselves valid and their validity can be set aside only by the contrary nature of their objects or by the recognition of discrepancies in their causes. Correspondence and coherence theories do not produce validity but only test it."[7]

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6 The Devata—Adhikarana I, iii, 26 to 33 of Brahma-Sutras and Śankara Bhaṣya thereon.

7 Sir Radhakrishnan. Article on Indian Philosophy, Encyclopaedia Brittanica, 14th Edition, 1929.

(*ii*) "According to most of the pro-Vedic schools the authority of the Vedas lies in their being the words of God. But the Mimamsa which does not believe in any Creator or Destroyer of the world believes that the Vedas (like the Lord) are eternal. They are not the work of any person human or divine. Hence the authority of the Vedas is said to be impersonal. Elaborate arguments are advanced to support this view. The infallibility of the Vedas rests on the fact that they are not vitiated by any of the defects to which the work of imperfect persons is subject."[8]

Holding the Vedas to be uncreated and existent from all eternity, it lays special stress on the proposition that sounds are eternal and on the consequent doctrine that the connection of a word with its sense is not due to convention but is by nature inherent in the word itself and is eternal.

The methodical and established scheme of setting forth a proposition in five parts in the Mimamsa Śastra has been also adopted by other schools of Indian Philosophy. The five divisions are :—

(1) विषय i.e., subject matter under consideration.

(2) विशय (or संशय) i.e., doubt arising in connection with that matter.

(3) पूर्वपक्ष i.e., standpoint of the opponent and arguments in support thereof.

(4) उत्तरपक्ष (or सिद्धान्त) i.e., demonstrated conclusion.

(5) सङ्गति i.e., relevancy of discussion with the particular context.

Some authors explain the उत्तरपक्ष as the arguments against the view of the opponent; and instead of सङ्गति they have निर्णय which they explain as Siddhanta.

This resembles the arguments in a law court by counsel on both sides and the judgment by the judge thereafter.

The life which the Mimamsa Śastra lays down is the stern austere life which is taught in the *Bhagavad Gita*.

The true character of Dharma belongs to such acts as :—

(*i*) the Agnihotra and the like which are directly enjoined in the Vedic Injunctive texts.

(*ii*) the Aṣtaka and the like which are laid down in the Smritis.

(*iii*) the Holaka and the like established by usage and custom.

These acts should be performed and these constitute the discipline of the Mimamsa Śastra. According to the Bhatta school these duties are concerned as serving an end viz., over-

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8 An Introduction to Indian Philosophy 3rd edition 1948 by S. Chatterjee and D. Datta, Calcutta University, Pages 369-370.

coming past sins (दुरितक्षय). Further adherence to Dharma keeps off the sin (प्रत्यवाय) that is seen to result from their neglect. "According to Prabhakara, the acts are not means to an end but are themselves an end. Here we have a conception of duty for duty's sake and that in a sense more rigorous than in the Gita since even motives so pure as "cleansing the heart" and "subserving the purposes" of God are excluded and the doing of a duty is placed on a basis of absolute disinterestedness."[9]

As the Research Scholar in the Ganganatha Jha Research Institute, Allahabad, I have produced the work under the supervision of Mm. Dr. Umesha Mishra, the Secretary, Reader in Sanskrit, Allahabad University and now Head of the Mithila Institute, Darbhanga, Government of Behar.

I am extremely fortunate that my work was scrutinized by Dr. Sir. S. Varadachariar, Retired Judge, Federal Court and now Chairman, Income Tax Investigation Commission and I am very grateful to him for the same.

Regarding the publication I should consider it as my singular good fortune that the Institute found a patron in Sir Har Govind Misra of Kanpur whose magnanimous generosity in publishing this part has enabled me to place my life work in the hands of the students of Law. I trust that my good fortune would continue till the publication of the rest of the work comprising the other parts mentioned before:

I Mimamsa Jurisprudence—The Juristic Personality of Deities.

II. Mimamsa Jurisprudence—The Fundamentals of Mimamsa.

III Mimamsa Rules of Interpretation—with illustrative cases from the Law Reports.

I have tried to place in the above three parts and in this part Mimamsa Jurisprudence—The Sources of Law all that the Mimamsa Śastra could yield for the lawyer—the thing which Colebrooke suggested in his lecture on Mimamsa in 1826 before the Royal Asiatic Society of Great Britain and Ireland.

Following the noble example of Mm Dr. Ganganatha Jha I should have quoted all the relevant original texts with translation and this would enable the reader to draw the conclusions for himself; but the exigencies of the cost of printing etc., compelled me to adopt the narrative form.

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9 Hiriyanna—Outlines of Indian Philosophy, page 330.

Chapter I

DHARMA, ITS CONCEPT

The whole of the Mimamsa Śastra deals with Dharma, which is, as Dr. Jolly points out, "one of the most comprehensive and important terms in the whole range of Sanskrit Literature."[1]

The first Sutra of the Mimamsa as has been already mentioned is "Now therefore comes the enquiry into Dharma." The word अथ in common parlance denotes sequence to an event. Reading the Vedas according to the prescribed mode (वेदाध्ययनम्) would be the required event. Hence (वेदाध्ययनम्) the reading of the Vedas, indicates the memorising of the text according to the rules and injunctions prescribed for its study. Such a knowledge of the text is a general requisite as the Mimamsa Śastra involves various kinds of discussion about Vedic texts.

After the study of the Vedas two courses are open to the student. He may return from the teacher's house and enter married life; or he may continue to remain in the teacher's house carrying on investigation into the meaning of the Vedic texts. The Sutra conveys the advice that one should not leave the teacher's house; for if he did, how could he investigate into the meaning of the Vedic texts ?

In answer to the question raised that the Vedic text [2]"Having read the Veda one should take the bath" indicating the end of student's life indicates nothing in the interval between the Adhyayana and the Bath and that the enquiry into Dharma in the interval may amount to a transgression of the Vedic injunction, Śabara, the Bhaṣyakara, in a tone of righteous indignation replies: "We shall certainly transgress the injunction when we find that by not transgressing it we should be making the highly useful Veda entirely useless. The useful purpose of the Veda is to make us aware of our duties—Dharma."[3] This is the reason ascertained by all for the study of the Veda. This is the meaning of अतः 'therefore' of the first Sutra.

Thus the subject to be investigated is Dharma. This implies its five divisions: (1) what is Dharma, (2) what is its definition, (3) what are the right means of accomplishing Dharma, (4) what are the wrong means of accomplishing Dharma,

1 Encyclopaedia of Religion and Ethics Vol. V, 1911, Edited by James Hastings. Article on Dharma by Julius Jolly.

2 वेदम् अधीत्य स्नायात्

3 अनतिक्रामन्तो वेदम् अर्थवन्तम् सन्तम् अनर्थकम् अवकल्पयेम। वृष्टो हि तस्य अर्थः कर्मावबोधनं नाम। Śabara Bhaṣya on I i 1.

and (5) what is the end or purpose of Dharma. The first two questions are answered in the next Sutra[4] and the other three questions are answered in the remaining portions of the Mimamsa Sutra.

The utility of this study is given by Śabara in terms recalling Lord Krisna's assurance in the *Bhagavad-Gita* "We *declare solemnly* that Dharma endows man with the highest good."[5]

Dharma is defined in the second sutra as "that which is indicated by the Vedic injunction as conducive to the highest good." The Vedic injunction[6] is the injunctive text—the text which induces or compels men to act to achieve the highest truth.

It is the Vedic injunction which is capable of making known (indicating) what is past, present or future and also what is subtle or hidden or remote. They are not capable of being known by any other means of knowledge. That Heaven is the result of the performance of the sacrifice is not known by any other means of knowledge and the knowledge thus acquired is infallible. This knowledge is never found to be sublated at any time or with regard to any person or under any circumstances or at any place. Hence it follows that it is not wrong.

It has been said that the only source of Dharma is the Veda. But later on[7], Jaimini discusses the other two sources of Dharma —Smriti and Sadachara; he generally establishes the dependence of these two new sources on the Vedas and also the limitations under which they would function as sources of Dharma.

The standard examples of Dharmic acts in the Mimamsa Shastra are :—

(1) The *Agnihotra* and the like which are directly enjoined by the Vedic injunctive texts.

(2) The *Aṣtaka* and the like which are laid down in the Smriti texts.

(3) The *Holaka* and the like established by usage and custom सवाचार.

It will not be out of place to refer very briefly to the development found in the concept of Dharma. Rita (ऋत) was used in the Vedic age meaning 'Cosmic order' the maintenance of which was the purpose of the gods. Later, the word also came to mean 'Right' showing that the world is conceived as being preserved against not only physical disorder but also moral chaos. Varuna is the chief supporter of this principle and is styled as the real trustee of *Rita*. But the other gods not excluding Indra show this quality in some degree or other. The gods are in fact

4 चोदनालक्षणोऽर्थो धर्मः । Jaimini I 1 2.

5 निःश्रेयसेन पुरुषं संयुनक्ति इति प्रतिजानीमहे । Śabara Bhaṣya on I. i. 1.

6 चोवना इति क्रियायाः प्रवर्तकं वचनम् । Śabara Bhaṣya on I. i.1.

7 Pada iii of the 1st Adhyaya.

styled as the guardians of *Rita*. In course of time the word 'Dharma' superseded Rita and was a compendious term indicating the means of realising the highest aim of life. In other words, Dharma means "The whole duty of man in relation to the four-fold purpose of life (धर्म, अर्थ, काम and मोक्ष) by members of the four groups (चातुर्वर्ण्य) and the four stages (चतुराश्रम)."[8] The acts of Dharma are generally divided into (1) साधारण-धर्म —comprising virtues as Ahimsa, Satya, etc. (2) वर्णधर्म—intended for the four classes and (3) आश्रमधर्म —intended for the four stages or orders of life.

It should be distinctly understood that ethical conduct is not excluded because moral purity is taken as a *sine quo non* for the fruitful practice of ritual. "The Vedas will not clean the ethically unworthy."[9]

We should not also think that Dharmic acts are non-social or purely individualistic. Illustrating the types of Dharma in the Smritis, Śabara takes the well-known examples as :—

(*i*) Tanks should be dug (तडागं खनितव्यम्)

(*ii*) Places for the free distribution of water to weary travellers should be set up (प्रपाः प्रवर्तयितव्याः). The very social purpose, the very public good which these acts typify are considered as sufficient to justify these as Dharma. Śabara states दृष्टार्थत्वाद् एव प्रामाण्यम्[10] and does not want to further justify them as acts by reference to the unseen (अदृष्ट) good which these acts bring to the individual performer. No doubt there is always the individual good which these acts bring to the performer but it is unnecessary to go to that step to justify these acts of public good—acts philanthropic in themselves. Śabara states :—

"Water places and tanks are philanthropic works conducive to the benefit of the people and not conducive to Dharma *only* (as that would be cognizable only through the Veda)."[11]

That these acts are Dharmic acts goes without saying and that is what Śabara wants to establish when he says that "the acts which have a visible good are by that very fact Dharma; the acts which have an invisible good should be held as Dharmic by inferring a Vedic source."[12]

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8 Radhakrishnan. Religion and Society: Kamala Lectures, 1947, page 107.

9 आचारहीनं न पुनन्ति वेदाः । Vaśiṣtha Dharma Sutra VI, 3.

10 Śabara Bhaṣya I. iii. 2.

11 प्रायः तडागानि च परोपकाराय, न धर्माय इति एव अवगम्यते । Śabara Bhaṣya on I. iii. 2

12 तेन ये दृष्टार्थाः ते ततः एव प्रमाणम् । ये तु अदृष्टार्थाः तेषु वैदिकशब्दानुमानम् इति Śabara's concluding sentences on I-iii-2 establishing the authority of Smritis.

It is strange that this contention of Śabara appealing to Dharmic acts on the basis of public good has been misunderstood.[13]

Kumarila does not subscribe wholesale to the view of Śabara. Kumarila feels that the appeal to public good as an auxiliary test of Dharma might be easily mistaken by many to be the sole test and further states that if taken as the sole test a treatise on Dharma i.e., the Dharma Śastra would be no better than a treatise on agriculture.

According to Kumarila although it is the Veda that formulates what is Dharma, it appeals to man's innate desire for his own good by pointing out some welcome result, such for instance, the attainment of Heaven. It means that the Veda does not and cannot generate desire. Its purpose is only to communicate to man a knowledge, otherwise unattainable, of certain means to certain ends; but it leaves the question of choosing those ends entirely to him.

The Prabhakara school contends that to appeal to a desirable result in order to make Dharma acceptable is to divorce it from all that it stands for and therefore affirms that the ideal of Dharma should be pursued for its own sake. Veda is entitled to command without commending it. Hence, we have the true imperative of obligation (Niyoga) and it is this "*ought*" and not the ceremonial act that is meant by Dharma.

The appeal to अदृष्टफल alone was in course of time made the sole criterion for fixing the mandatory character of the Vedic and Smriti texts especially in the field of Vyavahara. For example, in a text which consists of many qualifications of a would-be bride, some qualifications having a visible फल and others having अदृष्टफल, those which have the अदृष्टफल ends alone were considered mandatory. This subject is dealt with in the following section in detail.

Section 2. The principle of अदृष्ट e. g., in the law of marriage.

The question is whether Sagotra marriages are valid. The answer to the question depends upon the construction of three verses of Manu and three of Yajnavalkya.[14] The texts enjoin that one should not marry a maiden with a tawny hair or one with superfluous limbs or one who has disease. The texts also enjoin

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13 S. N. Das Gupta in his History of Indian Philosophy Vol. IV, 1949 page 5 quotes the above Śabara passage and states: "Thus the digging of wells etc., is directly known by experience to be of public good (परोपकाराय) and therefore is not Dharma." . The word एव appearing in न धर्माय इति एव अवगम्यते। has been omitted and is the cause of the error.

14 Manu Adhyaya III. 5,8, 10; Yajnavalkya I.iii. 52, 53 and 54.

for example, that she should be healthy and should have no brothers. Along with these is coupled an injunction that the girl should not be of the same Gotra or Pravara as the bridegroom.

It is not disputed that except the restrictions that the parties to the marriage should not be of the same Gotra and Pravara and should not be related within 7 degrees on the father's side and 5 degrees on the mother's side, all the rest are only qualities for which a girl may be preferred but are not enjoined as necessary qualities in an would-be bride. The question at issue is about the mandatory nature of the injunction regarding Gotra and Pravara restrictions.

Construing Manu, Medhatithi lays down that in the whole of this section on marriage where the prohibition is based upon grounds that are not perceptible e.g., one should marry a maiden who is not his father's sapinda, if the prohibition is disobeyed, the marriage itself remains unaccomplished. Hence if one happens to marry a girl belonging to the same gotra as himself, the marriage though performed would be as good as not performed; and this, for the simple reason that the character of marriage is determined by scriptural injunction: just like the character of the Fire-laying rite; and so a transgression of the injunction means the non-accomplishment of the rite. Hence, it has been ordained that such a girl even though she may have gone through the sacramental rites shall be given up.[15]

The Mitakṣara construing Yajnavalkya comes to the same conclusion and for the same reason. In the case of marriage with girls who are सपिण्ड, समानगोत्र and समानप्रवर the condition of wifehood does not come into being but in the case of girls who are afflicted with diseases etc., the condition of wifehood does come into being but there is a conflict with regard to worldly considerations only.[16]

This question was the subject matter of adjudication in the judgment of the Bombay High Court in I. L. R. 1946 Bombay 375. The counsel[17] supporting the contention that a Sagotra marriage is void argued that if there is a seen (दृष्ट) or easily perceptible reason for a rule stated in the sacred texts, it is only

15 Medhatithi Bhaṣya on Adhya. III, Ślo. 11. अस्मिन् प्रकरणे यत्र नास्ति दृष्टगतः प्रतिषेधः यथा असपिण्डा च इत्यत्रश्लोके तदतिक्रमे विवाहस्वरूपानिवृत्तिरेव । अतः सगोत्रविवाहः कृतोऽपि अकृत एव ।

16 Mitakṣara on Yaj. I. iii, 52 to 54. सपिण्डासु समानगोत्रासु समानप्रवरासु भार्यात्वम् एव न उपपद्यते । रोगिण्यादिषु तु भार्यात्वे उत्पन्नेऽपि दृष्टविरोध एव ।

17 The counsel was P. V. Kane who quoted his *History of Dharma Śastra*, Vol. II, Part I, page 437 where the Mimamsa principle is discussed.

recommendatory and the breach of such a rule does not nullify the principal act. But if there is a breach of a rule, in cases of अदृष्ट, the principal act itself is rendered invalid and nugatory thereby.

Gajendragadkar J. rejected this argument and stated that "Vijnaneśwara's interpretation is based on the Mimamsa Rules of Interpretation" and that "the rule is artifical" and that he "would not be prepared to adopt it as a safe guide in interpreting Sanskrit texts."

The above is really a serious charge against the अदृष्ट principle of the Mimamsa Śastra.

"Hindu lawyers and philosophers did not consider it wise to base any system of rules of conduct whether legal, social or ethical upon a purely rationalistic foundation or upon the commands of human authority. The authority of Revelation alone could furnish the bedrock upon which a suitable system of law and order could be founded."[18]

"The *raison d'etre* and function of Śruti according to the Hindu theologians is to impart knowledge which could not be obtained from other sources or to prescribe acts which would not be performed by the mere prompting of natural inclination. Otherwise the Vedas would be superfluous. No revelation, inspiration or supra-mundane authority is required to tell us things which can be learnt by the light of nature alone. At first time this doctrine would appear to have the advantage of confirming the scope and domain of the Scriptures to things which are purely scriptural. But the doctrine has been applied in a manner which will surprise the modern mind and especially the minds of foreigners. Where the Smritis enjoin the performance of particular acts for which no justification in the mere light of nature can be found, the rules are held to be valid and for this reason. To discard the injunction as not binding on the ground that no earthly reason can be found for it would be a total repudiation of the validity of the scriptures. No principle of interpretation could be accepted as valid which would have the effect of abrogating the rule. The maxims of interpretation applied by the Mimamsaka show very high legal acumen and differ but little from the maxims of modern lawyers in the interpretation of Statutes."[19]

"Dharma has been defined by the Mimamsaka as अलौकिक-श्रेयस्साधन i.e., the means of attaining welfare or happiness where the connection between the act or omission and the conse-

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18 Sir. P.S. Sivaswamy Ayyar's Foreword to Sankara Rama Sastry's Fictions in the Development of Hindu Law Texts, 1926 Madras.

19 Sir P. S. Sivaswamy Ayyar's Lectures on *The Evolution of Hindu Moral Ideals* Kamala Lectures, 1935, Calcutta University.

quent welfare or happiness is mysterious and not ascertainable. An act may constitute Dharma in the popular sense, but it is not Dharma according to the Mimamsaka unless the connection between the act or omission and the resulting good is mysterious i.e., can be established only by the intervention of what is called अदृष्ट or अपूर्व—the existence of the link being vouch-safed only by the Sruti."[20]

For instance, when the rice is husked, there is a visible effect but when the rice is sprinkled with water, no effect is visible; yet there must be one—otherwise the sprinkling would not be enjoined. This is the अदृष्ट. However, the Mimamsa teaches very sensibly that the use of this principle must be restricted as much as possible that, when a visible purpose is discernible no अदृष्ट must be assumed. "For otherwise the whole ritual would be resolved into a string of performances of which nobody would understand how they came to be combined."[21]

The term वेद is from the root विद् to know and indicates that by which is obtained the knowledge of the ways and means of achieving spiritual ends (अलौकिकं पुरुषोपायो वेत्ति अनेन इति).[22] It we abandon this, the only ground on which the वेदस्य वेदता rests and which is its special sphere would have to be abandoned.

We may conclude this chapter on Dharma by quoting the words of Dr Ganganatha Jha "that for Jaimini, in fact for all Indian philosophers, the connotation of the term 'Dharma' is very mnch wider than its usual rendering, Religion ; it stands for *the whole duty of man*, the performance of which is conducive to his welfare, here, in this world, during present life as also elsewhere after death.[23] The subject matter of Mimamsa is Dharma and this term stands for what man should do; but in common usage the term includes such acts as याग (sacrifice proper), होम (pouring of libations), दान (making gifts), स्नान (bathing), ध्यान (meditation), जप (repeating Mantras) and so forth ; but the principal forms of Dharma that form the subject of the Mimamsa Sastra are याग, दान and होम[24]" The Bhaṣya says "The Primary act is in the form of याग, दान and होम".

20 *Ibid.* Sruti means and includes in the context the other sources of Dharma as well.

21 Dr. Thibaut—*Artha Samgraha*. Introduction page xii.

22 The following text is oft quoted:

प्रत्यक्षेणानुमित्या वा यस्त्वुपायो न विद्यते। एवं विदन्ति वेदेन तस्माद् वेदस्य वेदता ॥

The end which cannot be known by the evidence of direct perception, inference and the like, can be known through Veda and therefore determines the character of Veda.

23-24. *Purva Mimamsa in its sources.* page 9. 359

Chapter II

THE VEDAS

Coming to the sources of Dharma, the first and most important one is the Veda. In fact, it is the only source of Dharma. In other words, all the other sources of Dharma recognised by Mimamsa viz., Smriti and Sadachara are directly or indirectly based on the Veda. This may be considered as one of the cardinal tenets of the Mimamsaka.

Though there are many aspects in the consideration of the Vedas as the source of Dharma, yet for our purposes the only essential factors are (*i*) the अपौरुषेयत्व and (*ii*) the स्वतःप्रामाण्य of the Vedas.

(*i*) अपौरुषेयत्व *of the Vedas.*—It states that the Vedas are eternal and self-existent and have no author. This proposition is supported by a great number of philosophical arguments which may be unnecessary to enter into. But we may state that the main argument centres round the theories that the word is eternal, that the sense of the word is eternal and that the relation between word and sense is eternal; and that the sentence consists of nothing more than the meaning of its component parts viz., the words.

(*ii*) स्वतःप्रामाण्य *of the Vedas.*—The theory relates to the self-existent validity of the Vedas. Two conclusions are drawn by the Mimamsa:—

(*a*) The validity of knowledge *arises* from the very conditions that give rise to that knowledge and not from any extra conditions. (प्रामाण्यं स्वतः उत्पद्यते).

(*b*) The validity of knowledge is also *believed* in or known as soon as the knowledge arises. Belief does not await the verifications of the knowledge by some other knowledge, say an inference. (प्रामाण्यं स्वतः ज्ञायते च). This Mimamsa view is known as the theory of intrinsic validity (स्वतःप्रामाण्यवाद).

The two theories of अपौरुषेयत्व and स्वतःप्रामाण्य of the Vedas are inter-related. From the very fact that the Veda is अपौरुषेय it becomes evident that it is also self-valid. In other words, all that is Veda is taken to be beyond doubt and its infallibility is never questioned. Moreover, according to the Mimamsaka, शब्द and its अर्थ and their relation are all eternal and they are certain for ever. So no doubt can ever arise as to their validity. This is very clear from the nature of the परा, पश्यन्ती and मध्यमा the three well-known forms of वाक्. Veda is regarded as identical with परा and hence, it is self-valid, while all other forms of शब्द depend upon it.

Similarly, the Mimāmsaka does not accept the view of the Naiyyayikas that God is the author of the Vedas. According to the Naiyyayikas God should be considered as the author of the Vedas. This theistic argument has this foundation underlying it viz., the Vedas being produced by the omnipotent and the omniscient God are infallible and free from all errors.

Nor do the Mimamsakas accept the interpretation of the Vedantins who think that the Vedas are the very life-breath of God and hence it is अपौरुषेय. The Advaitin's belief is common to all the schools of Vedanta and therefore forms one of the basic religious creeds of every Hindu. The Advaitin holds that the Veda is अपौरुषेय—in so far as its verbal form and substance are concerned the Veda is independent of God but the propagation at the beginning of each cycle is due to Him.

The other way in which the Mimamsaka view of the authority of the Vedas is reconcilable even to modern minds consists in the fact that the Vedas represent the collective spiritual experiences of the race. The dogmas, as they may appear to some, are really the capitalized spiritual experiences of the race having an implicit rationality of their own and awaiting a rational verification in the personal experience of the individual giving birth to a belief made stronger since co-added to reason. If arguments in favour of a philosophy are sufficient to satisfy one's reason, the additional fact of its being based upon the experience of persons of clearer minds and purer hearts will rather add to its value. The Mimamsa develops its theme with such strong independent arguments that the theories can stand well and compare favourably with any theory established elsewhere on independent reasoning alone and do satisfy especially the believing Hindu.

It is in this sense of the Vedas representing the spiritual experiences of the race that the doctrine of three debts (which is a living factor from the dawn of history to the present day) is based. The discharge of the debt to the Riṣi consists in the *knowing* of the Vedas i.e., the Dharma or the spiritual experiences of the race. The discharge of the debt to the Devas consists in the *living* of the life of the Veda, by obeying the injunctions contained therein. Not content with knowing and living a life of Dharma, the third debt to the Pitris or ancestors is discharged by *transmitting* to posterity the Vedic Dharma representing the cultural heritage of the race. As the ancestors gave us the heritage, we are bound to pass it on to the coming generations.

It is for this reason that Prabhakara made the Adhyayana Vidhi into an Adhyapana Vidhi; not caring for strict Śastraic accuracy, Prabhakara laid the burden upon the Brahmana of being

an Adhyapaka—of finding out disciples who would be ready and willing to bear the burden of the national heritage for transmitting it on still further to future generations. It is in this sense probably that Kumarila emphasised the गुरुपरम्परा nature of the Vedic study and instruction by the Guru to the disciple.

Besides, for every infallible authority there are three tests: श्रुति, युक्ति and अनुभव—Authority, Reason and Experience. They are also known as श्रवण, मनन and निदिध्यासन. It is with the help of these that a thing is proved. Whatever is heard or taken to be a premise should be consistent with the results of reasoning about the same matter. But reasoning alone cannot be relied upon. Hence it is in the furnace of one's experience that the dross is removed and the gold of the Śruti shines as साक्षात्कार—as part and parcel of one's own treasure. These three methods taken together give the same result viz., the proof of the validity of the premise. This is what we find in the Veda. Whatever is said in the Veda is reasoned out correctly, is tested and found to be true in one's own experience. This has been so experienced by the great thinkers and seers of the past. There has been no occasion to find any disagreement in the Vedas which reveal themselves as the highest authority regarding all our duties i.e., Dharma. It has been recognised rightly by even the moderners that the Vedas represent the quintessence of the *capitalized spiritual experiences* of the *race*. Experiences supported by authority and reason on the one hand are again verified to be true in one's own experience. In fact experiences can have no value if they go against authority and reason. Veda satisfies all these three conditions or tests of authority and therefore, it is infallible and is always a guide—infallible and true on the path of our duty or Dharma.[1]

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1 Śankara claims for the realisation of Vedanta truths the sphere of अनुभव but states that for *Dharma* we have Śruti, Smriti and Sadachara as the only sources. In the *Brahma Sutra Bhaṣya* I, i-2, he says : न धर्मजिज्ञासायाम् इव श्रुत्यादय एव प्रमाणं ब्रह्मजिज्ञासायाम् । किं तु श्रुत्यादयश्च अनुभवादयश्च यथासंभवम् इह प्रमाणम्, अनुभवावसानत्वात् भूतवस्तुविषयत्वात् च ब्रह्मज्ञानस्य ।

Scriptural texts etc., are not in the enquiry into Brahman the only means of knowledge as they are in the enquiry into the active duty (i.e., the Purva Mimamsa Śastra) but scriptural texts etc., on the one hand and intuition etc., on the other hand, are to be had recourse to according to the occasion. Firstly, because intuition is the final result of the enquiry into Brahman; secondly, because the object of enquiry is an existing (accomplished) substance. *See footnote continued on page 18.*

Section 2—The five divisions of the Veda[2]

Having indicated the main cardinal propositions about the Veda, we shall now examine in brief the five divisions of the Veda.

The five divisions into which the Mimamsakas have divided the Veda are:—(1) Injunction (विधि), (2) Hymns-Sacrificial prayers (मन्त्र), (3) Names (नामधेय), (4) Prohibitions (निषेध) and (5) Explanatory passages (अर्थवाद).

The 'Vidhi' has been defined as the injunction which enjoins some act for the first time (i.e., which is not enjoined elsewhere) and which has a useful purpose. The standard example is: अग्निहोत्रं जुहुयात् स्वर्गकामः. He who is desirous of heaven must perform the Agnihotra. The obligation of performing the Agnihotra is not known in any other way except by this injunction and this has the useful purpose of obtaining Heaven or Swarga. In technical parlance, this is known as कर्मोत्पत्तिविधि; and the full significance is that the sacrificer shall obtain Heaven by the instrumentality of the performance of Agnihotra.

The next type of Vidhi is known as the गुणविधि. 'By curd he shall offer the oblation' (दध्ना जुहुयात्) is the standard example of गुणविधि. The main sacrifice of the Agnihotra is already enjoined in other texts as quoted in the previous paragraph; and this Vidhi enjoining curd to be offered as an oblation is subordinate to the main Agnihotra sacrifice; and is therefore called a गुणविधि or a Vidhi enjoining an accessory; and the full significance is that the sacrificer shall use the curd—the material oblation in the Agnihotra sacrifice which has already been enjoined.

A third type of Vidhi, viz., गुणविशिष्टविधि is known where both the sacrifice itself and its material accessory are enjoined for the first time in a single text. सोमेन यजेत is the standard example. Here the Soma which is the material for the sacrifice as well as the sacrifice not being established by any other injunction, the text enjoins that the sacrificer shall per-

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Dr. Thibaut's translation. The Vedanta Sutras with the Bhaṣya of Śankara. Sacred Books of the East, Vol. XXXIV, 1890, pages 17-18. N. B.—The term श्रुत्यादय: should refer to Śruti, Smriti and Sadachara and not to श्रुति, लिङ्ग, वाक्य, प्रकरण, स्थान, and समाख्या as Anandagiri would construe.

2 This subject forming one of the corner-stones of the Mimamsa Rules of Interpretation would be dealt with in great detail in the part "The Mimamsa Rules of Interpretation." It is treated here in a summary way to make this part on the "Sources of Dharma" self-contained.

form the sacrifice with सोम as its material. This type of Vidhi is known as the गुणविशिष्ट-विधि or particularised injunction (of both the rite and accessory at once). The full significance of the text is that the sacrificer shall obtain Heaven by the instrumentality of the sacrifice in which the oblation is Soma.

Another method divides the Vidhi into four types:—
(*i*) उत्पत्तिविधि, (*ii*) विनियोगविधि, (*iii*) प्रयोगविधि and (*iv*) अधिकारविधि.

The उत्पत्तिविधि or an originative injunction is one in which merely the general nature of the rite is indicated as—He who is desirous of Heaven must perform the Agnihotra sacrifice. Passages of this kind have an instigatory character in consequence of the form being लिङ्, लोट् or having a तव्यप्रत्यय. In the Vedas the instigatory power rests solely with the eternal Veda—its *word* which has no human mind for its antecedent. Bringing this nearer home, we might say that the Vedas are the Book of Commandments. In a strictly theistic system, we might have styled it as the Book of God; but the same is not strictly applicable in the Mimamsa system where the Vedas have a self-subsistent sole authority. This form of expression requires great elucidation and the same is reserved for a fuller treatment in the Bhavana-Adhikarana in the next part "*Mimamsa Jurisprudence—The Fundamentals of Mimamsa.*"

These originative injuctions acting upon the mind of the person excite in him the desire to perform the act, the result of which the heavenly world or some other earthly possession is pointed out. Generally the उत्पत्तिविधि itself intimates the result. But the sacrificer has yet to know the mode or procedure by which the sacrifice has to be done. This is indicated by the second type of Injunctions known as विनियोगविधि or Injunctions of application. By this type of injunction the sacrificer knows all the actions and things which are subordinate or subservient to the principal sacrifice. There is the standard example of this type of Vidhi दध्ना जुहोति which means दध्ना होमं भावयेत्. He should effect the oblation by means of the curd. This Vidhi enjoins that curd is an अङ्ग or subsidiary matter to the Agnihotra sacrifice already enjoined.

Mimamsakas have laid down six proofs or tests by which the nature of the mutual relation of the various factors is determined and they are Śruti, Linga, Vakya, Prakarana, Sthana, and Samakhya—direct statement, word-power, syntactic connection, context, position and name. In the example given above, that the curd is the oblation i.e., the means by which the oblation is accomplished is known by the proof entitled Śruti or direct statement. The treatment of these six modes of proof including the superiority of each previous one to the succeeding modes of

proof would be dealt with in the part on *The Mimamsa Rules of Interpretation*.

So far we have got the sacrifice and its subordinate parts. We still require additional information about one point viz., the order in which the several acts have to be performed. The information regarding these is furnished by the प्रयोगविधि or injunction of performance. How the acts should be performed in succession to one another is decided by several indicia and there are six methods of proof indicating the order—Śruti, Artha, Patha, Pravritti, Sthana and Mukhya—Direct statement, purpose, verbal text, commencement, place and principal.

Lastly, comes the class of injunctions styled as the अधिकार-विधि. This gives us the information about the qualification of the performer of the sacrifice enjoined. Who are the persons entitled to claim the promised fruits of the action is answered by this type of Adhikara Vidhi. In the illustration given स्वर्गकामो यजेत—He who desires Heaven must sacrifice, it is laid down that the *right* to enjoy the fruit to be produced by the sacrifice is given to him 'who *desires* Heaven.' In the example, "The King who desires rulership of Heaven shall sacrifice with the Rajasuya", though it enjoins Rajasuya with a view to the rulership of Heaven, still the text does not assure the enjoyment of that fruit to any one who merely desires the rulership of heaven, but to one who being a king desires the same. There are again certain fundamental requisites necessary in every sacrificer viz. the knowledge gained by the following of the injunctions of study and the possession of the sacred fires through having previously laid them.

Thus the Vidhis or injunctions which are the heart of the Veda are to be known and analysed.

We now come to the second division of the Vedas viz., the 'Mantras'. These are the Sacrificial Prayers used at a sacrifice. The Mimamsakas demonstrate that every line and word of the sacred texts somehow or other refer to acts of duty incumbent on men. They are also anxious to show that when a visible purpose is to be understood, that alone should act as the test and one should apply a significance of a purely spiritual or supersensuous nature when a visible purpose cannot by any means be made out. Applying these principles the Mimamsakas make out that the Mantras have the purpose of reminding the sacrificer of the different matters connected with the sacrifice, for instance, the divinities or Devatas to whom the various oblations are to be given. In certain cases where this could not be made out, a mystical supersensuous effect directly contributing to the transcendental result is accepted.

The application of the above principles in the Mimamsa has

been praised by Western scholars, and converts the sacrifice into a well connected whole while the ascription of a supersensuous principle to every act would reduce the whole sacrifice into a string of performances of which nobody would understand how they came to be combined.

But the Mimamsaka is anxious to insist that the help rendered by the Mantras at the sacrifice would not be rendered by any other means open to the sacrificer. Thus the use of the Mantras at the sacrifice is styled as a Niyama-Vidhi—or Restrictive Injunction i.e., an injunction establishing some thing (otherwise only partially established) for the case where it might be unestablished.

We next come to the 'Namadheyas'. It is rather difficult to understand as to why Namadheyas came to occupy a rank along with the other four divisions of the Veda. This type does not contain entire sentences but only particular words occuring in a Vidhi. The four passages normally treated in the text books are :— उद्भिदा यजेत पशुकामः । चित्रया यजेत पशुकामः । अग्निहोत्रं जुहोति and श्येनेन अभिचरन् यजेत; and the conclusion arrived at is that Udbhid, Chitra, Agnihotra and Śyena are the names of sacrifices enjoined by the respective texts. These injunctions except the Agnihotra were comparatively not so well-known and hence, it should have been a matter of practical importance to fix that these are the names of sacrifices to be performed —of sacrifices enjoined as a Vidhi.

Taking, for example, the text उद्भि यजेत पशुकामः we have the word पशु indicating the result of the sacrifice, while the *Yaga* is the instrument. Then the various constructions to which the word उद्भिद् may be put are analysed and rejected leaving finally the conclusion that उद्भिद् stands for the name of a sacrifice and as such occupies a position entitling it to be considered as belonging to a special subdivision of the Vedic texts.

Several rules of interpretation are involved before the conclusion is arrived at in each of the cases. Again, two general principles are deduced by Dr Ganganatha Jha from the treatment of this portion: (1) In doubtful cases the question is settled with the help of subsequent commendatory texts. (2) The indefinite is rendered definite by the capacity of things.[3]

The fourth division of the Vedas is styled 'Niṣedhas'. In fact, this is the negative of a Vidhi. The Vidhi enjoins an act to be done, while the Pratiṣedha prohibits the doing of an act. Just as injunctions which denote an instigation to do something suggest that the thing to be enjoined e.g., the sacrifice will bring

3 *Purva Mimamsa in its sources* by Dr. Ganganatha Jha 1942, pages 209 and 210.

about a desirable result and so instigate a man to do it, so also prohibitions e.g., न कलञ्जम् भक्षयेत्—One should not eat Kalanja, suggest that the thing prohibited viz., eating Kalanja will bring about an undesirable result and so deter a man from doing it. So the meaning of the sentence in all prohibitions is deterrent.

Regarding the sanction in a Pratiṣedha, we generally find sanction used for the instrument of coercion by which any system of imperative law is enforced; and sanctions are enforced by the State. The Mimamsa Śastra lays special emphasis upon the censure of cultured men. Śabara concludes a discussion on न कलञ्जम् भक्षयेत् as follows:—"The cultured men censure him stating he is one who has fallen off from all the rewards of any good acts that he might have done. This in itself would be a very great evil effect viz., that cultured men censure. Therefore, one should not eat Kalanja as the same has been prohibited by the order of the (Vedic) act in question."[4]

In the case of injunctions for which no definite result is predicated the cultured people declare Heaven to be the result; in the case of Pratiṣedhas the wise people declare the falling off from the rewards of good act as the punishment. In both cases the words of the Śiṣtas are (apart from the case of special texts) the basis of authority.

The negative in a prohibition would be combined with the injunctive efficient force on which all the rest of the sentence depends. And so the prohibition means the opposite of what the injunctive efficient force means. Since the meaning of the latter is impellent force, the meaning of the negation is deterrent force.

But yet in two cases the negative is not joined with the injunctive efficient force but with either the root meaning of the verb or with a noun. In both these cases we have no prohibitions but exclusions पर्युदास .This part of the subject involves the use of many rules of interpretation as Vikalpa (option) etc.

Lastly, we come to the treatment of 'Arthavadas.' Arthavadas comprise all those statements which either contain a praise of the things enjoined by the Vidhi or a blame of the things prohibited by the Niṣedhas.

These passages cannot be maintained to be directly connected with the आर्थी भावना as the whole action enjoined by the Vidhi is carried out without any help from the Arthavada sentences but the Arthavadas occupy a definite place in the Śabdi Bhavana i.e., the energy inherent in the Vidhi passages by which the latter

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4 अनन्तरम् एवम् शिष्टाः वर्जयेयुः, "पतितः कर्मफलेभ्य" इति । महान् च एषो दोषो यत् शिष्टा वर्जयन्ति । तस्माद् नियोगतः कलञ्जादि न भक्षयितव्यः । —*Śabara Bhaṣya.*

are able to impel man's mind and make him act.[5] Man, on the other hand, is impelled to perform an action when he hears it praised and glorified and on the other hands feels disinclined to do things which others reprehend and object to it.

It is thus shown how all the five parts of the Veda contribute to the establishment of Dharma. The above are the five divisions of the Veda from the point of analysis of the contents according to the Mimamsa Śastra.[6]

In the treatment of each of the divisions of the Veda many Rules of Interpretation came to be formulated. For example in the case of the Injunctive Sentence the question is raised as to which particular word or member of a word brings about the injunction. This bringing about is what has been given the technical name of Bhavana (भावना) i.e., the bringing into being or bringing about that which is signified by the injunctive लिङ्. The minute analysis of Bhavana in the Mimamsa Śastra far excels in point of analytical skill and philosophical insight anything done by Austin and others in the west in analysing the meaning of 'Command' and 'Sanction.'

In dealing with Mantras we have three rules discussed: (1) the principle of Syntactical unit (एकवाक्यता), (2) the principle of Syntactical split (वाक्यभेद) and (3) the principle of Elliptical extension (अनुषङ्ग). Though these rules arose out of the construction of Yajus Mantras, they were capable of application to ordinary sentences and were in fact so applied in the construction of Dharma Śastra texts. The term अर्थैकत्वात् used by Jaimini for defining a sentence was further construed differently by Parthasarathi Miśra and Someśwara Bhatta though both were followers of Kumarila Bhatta.

In dealing with Arthavadas for example, the important question of a text which puts forth a reason to an act that has been enjoined by another sentence is dealt with. This came up for adjudication before the Privy Council in the case of an adoption of an only son.

These and other Rules of Interpretation evolved in the analysis of the five divisions of the Veda would be considered in the part "Mimamsa Rules of Interpretation with illustrative cases from the Law Reports."

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5 For a full exposition of Bhavana and the place of Arthavada in it *vide* chapter on Bhavana in the next part—Mimmasa Jurisprudence, The Fundamentals of Mimamsa.

6 This is distinct from the four well known divisions of the Veda namely, Mantra, Brahmana, Aranyaka and Upaniṣad.

Chapter III

AUTHORITY OF SMRITIS

Section 1—Authority of Smritis in general

It has been made clear in the previous chapter that Veda (Śruti) is the sole authority in matters relating to Dharma. But it was found later on that all the details of Dharma were not explicitly mentioned in the Śruti. So the Vedas alone were not sufficient for the purpose of obtaining the proper knowledge of the whole duty of man; and the knowledge derived from the Veda had to be supplemented from two other sources viz :—

(*i*) the works known under the comprehensive name of Smriti.

(*ii*) Usage or custom of respectable cultured people. Hence, Jaimini found it necessary to deal with the consideration and reliability of these two supplementary sources of Dharma.

The fact that Smriti and custom are also treated as authorities for Dharma, might be regarded as vitiating the main thesis of the Mimamsaka that the Veda is the sole authority on the subject. In order to explain this apparently contradictory statement, an examination of the real basis on which Smriti and custom are based is necessary as also the further question viz. how far the Smriti and Custom may be allowed to interfere with the Veda in matters relating to Dharma. So we are called upon to discuss the nature of the authority of Smriti in detail.

Now Śabara takes up such cases which are not directly found mentioned in the Vedas but have their authoritative place in the Smritis. These instances are found to be as authoritative as the Vedic injunctions themselves. The following are the instances :

(*i*) The Aṣtaka Śraddha[1] must be performed

(*ii*) Tanks must be dug.

(*iii*) Places for the distribution of water to weary travellers (प्रपा:) must be set up.

Hindu religious and charitable endowments fall into two clear divisions—इष्ट and पूर्त ; the former means sacrifices and sacrificial gifts, while the latter means charites. पूर्त or

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1 Aṣtaka is a particular type of Śraddha performed in honour of the Pitris on the 8th day in the dark half of the months of Pauṣa, Magha and Phalguna. Manu (IV, 150) says that the progenitors must always be worshipped on those days. Gautama (VIII, 18) mentions the Aṣtaka in the list of forty sacraments to be performed by every Hindu.

charitable acts include the digging of tanks, setting up of places for supplying drinking water etc. So says Manu, "Let him without tiring offer sacrifices (इष्ट) and perform works of charity (पूर्त) with faith ; for offerings and charitable deeds done with faith and with lawfully earned money procures endless rewards."[2] Yama says: "Heaven is attained by इष्ट and by पूर्त one enjoys final emancipation";[3] and thus charity is placed on a higher footing than sacrifices.

The Purvapakṣin sets forth his objection to the authority of Smritis in general as follows :

"Inasmuch as Dharma is based upon the Veda, what is not Veda should be disregarded.[4] Dharma is that which is indicated by means of the Veda as conducive to the highest good and hence, the Smriti, not being Veda, has no sound basis and should be disregarded."

The Purvapakṣin now sets forth his fundamental objection to the acceptance of the authority of the Smritis by laying the greatest emphasis on the connotation of the term *Smriti*. False or wrong declarations might be made by the writers of the Smritis by reason of the impossibility of their having any *remembrance* of the acts concerned. As a matter of fact no one ever *remembers* any such thing as has not been actually experienced by him. The subject in question as the performance of the Aṣtaka Śraddha is not mentioned in the Veda. It is something superphysical and hence not cognizable by the ordinary means of cognition i.e., the Smriti writers could not have previously known the same; and no *remembrance* of the act is possible for the Smriti writers for the simple reason that they have not had the *previous cognition* which is what brings remembrance. Again, human beings do not in their present life have any direct apprehension of things like Aṣtaka; and what may have been apprehended in a previous life is not remembered during the present life.

To this objection the Siddhantin puts forth his reply : अपि वा कर्तृसामान्यात् प्रमाणम् अनुमानं स्यात् ।.[5] But Smritis are trustworthy as there would be inference or assumption of the basis in the Veda from the fact that the Karta (कर्ता) is the same i.e., the Karta—the author of the Smriti is the same as the Karta—performer of the acts prescribed in the Veda.

The Siddhantin agreeing with the view of the Purvapakṣin that the Smriti writers could not have any direct apprehension of

2 Manu, IV, 226.

3 Quoted in Pandit Saraswati's Religious Endowments and in Manohar Mookerji vs. Bhupendranath (1933) I. L. R. 60, Cal. 452, F. B.

4 Jaimini, I, iii-1.

5 Jaimini, I, iii-[illegible]

things like Aṣtaka states that we could infer as the ground of authority for the Smritis the Vedic text itself. It is the Vedic text itself which would have provided the Smriti writers with the *previous cognition* necessary for *remembrance*. Thus the appellation 'Smriti' having its basis in the Vedic text is perfectly accurate.

The Siddhantin has now to explain the basic foundation for his assertion that the Vedic text furnishes the previous cognition necessary for the remembrance; and sets forth his fundamental basis on which he builds his entire argument. This basis is explained by Śabara as: कर्तृसामान्यात् स्मृतिवैदिकपदार्थयोः[6]

The कर्ता—the author of the Smriti is the same as the कर्ता—the performer of the acts prescribed in the Veda. Thus, it becomes established that in the case of Smriti—Remembrance of the authors of the Smriti texts—there is actual connection (support, basis) in the Veda and hence, the Siddhantin establishes as the ground of reliability of the Smriti the Vedic text itself.

But in cases where such Vedic texts either direct or indicative are not available, the Siddhantin comes forward with the answer that if they do not actually find the Vedic text, they would infer the same. It is quite possible also that the text upon which the Smriti is based was actually known to the Smriti writers but has since been forgotten or lost.

Now, examining the three instances of Dharma given above we find that there is actual Vedic support for each of them. For the Aṣtaka Śraddha we find the Vedic text: यां जनाः प्रतिनन्दन्ति रात्रिम् धेनुरिवायतीम्। संवत्सरस्य या पत्नी सा नो अस्तु सुमङ्गली। अष्टका यैस्तु राधसे स्वाहा।[7]

Here Aṣtaka is spoken of as the Divinity of the Night eulogised as the 'Consort of the year;' and this text is taken as indicative of the desirability of performing the rights of Aṣtaka.

The digging of tanks is indicated by the Vedic text—स्थलयोदकं प्रतिगृह्णन्ति and the establishment of places for the free distribution of water is indicated by the Rig Vedic text—धन्वन्निव प्रपा असि[8].

Thus Śabara establishes the authority of the Smritis firstly on the basis of the indicative Vedic texts and secondly in case where indicative Vedic texts are not available on the basis of a lost Vedic text which is not available and which is forgotten.

Regarding the instances of the digging of tanks and the establishment of places where water is distributed free for travellers, Śabara takes his stand upon the clearly patent useful

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6 Śabara Bhaṣya on I, iii-2.

7 This Vedic text is quoted in the *Paraskara Grihya Sutra*, 3-2-2 and *Apastamba Mantra Patha*, 2-20-27.

8 *Rig Veda*, X-4-1.

purposes served by such acts of Dharma. Tanks and places where water is distributed are, every one has to admit, philanthropic works conducive to the benefit of the people and not conducive to Dharma only. The resultant good of those acts is visible to every one; and hence is not such as would be cognisable only by the Veda. Thus those rules of Smriti which serve patently useful purposes are trustworthy on that account but in the case of those that pertain to transcendental purposes we shall infer Vedic texts as their basis; and on this basis will rest their trustworthy character.

Regarding the Vedic basis of the Smritis Mm P. V. Kane, states that "the later rules contained in the Dharma Sutras and other works on Dharma Śastras had their roots deep down in the most ancient Vedic tradition and that the authors of the Dharma Sutras were quite justified in looking to the Vedas as the source of Dharma."[9] "The conclusion would irresistably force itself upon us that the foundations of Hindu Law are deeply laid in the Vedic age itself, that the peculiar characteristics that distinguish the Hindu Law of modern times from other systems of law had their germs in the Vedic period and that the later Hindu jurists were not wrong when they relied upon the Veda as the first source of Dharma."[10] This conclusion is drawn specially in respect of the law relating to marriage, sonship, partition, inheritance, Stridhana etc., which are even today subjects of practical interest in the administration of justice of Hindu Law. This conclusion is accepted by modern text writers on Hindu Law.[11]

Regarding the theory of lost Śrutis mentioned by Śabara we have full corroboration of the same in the researches made by modern scholars. Max Muller states that "We have no right to suppose that we have even a hundredth part of the religious and popular poetry that existed in the Vedic age."[12] Winternitz states that "the greater part of the Vedic Literature is irretrievably lost."[13] However, what is now called the Veda or Vedic literature consists of three different classes of literary works viz., the Saṃhita, the Brahmana and the Upaniṣad and to each of these three classes belongs a greater or a smaller number of separate works of which some have been preserved but also many lost. Apastam-

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9 Mm P. V. Kane—*History of Dharma Śastra*, Vol. 1, page 7.

10 Mm. P. V. Kane—*The Vedic basis of Hindu Law*—J. B. B. R. A. S. XXVI, pp. 57-82.

11 Mayne's *Hindu Law*, 10th Edn. 1938, 11th Edn. 1950, page 19.

12 *Six Systems of Indian Philosophy*, p. 41.

13 *History of Indian Literature*, Vol. I, 1927, page 118, 53.

ba's quotations from a *Bahvricha Brahmana* must be from a *Rig Veda Brahmana* which has not come down to us.[14] *Śatyayana Brahmana* of the *Sama Veda* is known to us only by quotations in the *Sayana Bhaṣya*.[15] Batakrishna Ghosh in his work entitled "*Collection of fragments of lost Brahmanas*" has collected the fragments from sixteen Brahmanas now lost to us.[16]

Regarding the appeal to the visibly useful purposes of Dharma Śastra, Kumarila, the Vartikakara, would demur and states that "it is not quite reasonable to assert their authority to be based upon ordinary perceptible senses and thereby make the duties laid in them similar to such ordinary acts as the tilling of the ground and the like which have a visible use If such actions as the digging of tanks have *only* visible results they would be like the ordinary actions of the world as agriculture." This has as noted before an important bearing on अदृष्ट doctrine.

In addition to the arguments in the *Śabara Bhaṣya* for the establishment of the authority of the Smritis, Kumarila makes certain important observations. In view of the importance of the discussion I quote the translation of Mm. Dr. Sir Ganganatha Jha of the passage in Kumarila's *Tantra Vartika*—

"(1) Now if we assume the fact of Manu being totally mistaken in the assertions he has made, this assumption would be contrary to the directly perceptible fact of his works being excellent compilations and containing many concrete and excellent teachings; and it would also tend to set aside the universally accepted authoritative character of his assertions. And this assumption would also necessitate many other gratuitous assumptions that the people of his own days accepted and followed the mistake propounded by Manu and so forth.

"(2) In the case of the assumption that the assertions are based upon the compiler's own personal observation, in the first place we have to assume the observation itself and then we should have to assume an extra-ordinary faculty in the compiler contrary to all that we know of people of the present day (by means of which they could directly percieve such super-physical entities on Dharma and the rest) and the possibility of any such extra-ordinary faculty we have already set aside in the course of refutation of omniscience of Buddha (Vide *Śloka Vartika* on *Jaimini Sutra*, I. i.2 Karikas 134 et seq.).

"(3) As for the assumption that these assertions are based upon those of other persons, this has already been set

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14 Keith—Harvard Oriental Series, Vol. 25, p. 48.

15 H. Ortel—*Journal of the American Oriental Society* , Vol, 81, p. 15.

16 Calcutta, 1935.

aside as resembling a description of colour handed down by blind men; nor does any such baseless tradition ever attain any authority.

"(4) Similarly, in the case of the assumption that Manu has purposely sought to delude people, we have to assume in the first place the fact of his purposely deluding people; secondly we have to assume his motive in thus seeking to delude people; thirdly the fact of the people having fallen into the mistake; fourthly the fact of the continuance of the mistake up to the present time and so forth. We shall have to make in that case endless assumptions. Then again this assumption would mean the denying of the authority of the firm connection of the teaching of Manu being true; and this would be a contradiction of a purely perceptible fact.

"(5) Therefore, it must be admitted that instead of these, it is far more reasonable to assume a direct Vedic injunction upon which the assertions of Manu are based; and it is only with this assumption that all other facts of the acceptance of the Smritis by the great and the learned become reconciled. And in the case of Manu it is quite possible that there should be Vedic injunctions that served as the source of Manu's conceptions."[17]

"The orthodox Mimamsaka has put forward the view that the teachings contained in the Smritis are all based upon Vedic texts. This hypothesis necessitates only one assumption—that of the existence and the subsequent disappearance from our view, of such Vedic texts, as are not found in the Veda-texts that are available at the present day. As a matter of fact, for most of the Injunctions contained in the Smritis corroborative Vedic texts are easily found; but there are some for whom we seek in vain for corroboration in the Vedic texts available to us; and with regard to these latter, it has been held that the Vedic texts were well-known to the compilers of the Smritis and have since become lost along with numerous Vedic Recensional Texts no longer current. Instead of compiling these Vedic Injunctions themselves, the Smriti writers had recourse to another method, because the order in which the Vedic Injunctions in question were found in the Veda was found, in the later degenerate times, to confuse the ordinary man; and so the writers set about arranging and classifying the various Duties and setting them forth in language more intelligible to the ordinary householder."[18]

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17 Mm. Dr. Sir Ganganatha Jha's translation of *Tantra Vartika*, pages 112-114.

18 Mm. Dr. Sir Ganganatha Jha's *Purva Mimamsa in its sources*, 1942, page, 217.

Thus Śabara and Kumarila have explained the position of the Mimamsa Śastra and placed it on unshakable foundations supported by the twin pillars of true fact and sound logic.

Section 2—Authority of Local Smritis

Smritis having been established as authoritative, it goes without saying that their authoritative nature is universal. But during the time when Kumarila wrote his *Vartika* he found as a matter of fact the following. Barring the Puranas, the Smriti of Manu and the Itihasas, all other Smriti works, such as those of Gautama, Vaśiṣtha, Śankha—Likhita, Harita, Apastamba as also the work on Grihyas (i.e., the Grihya Sutras) were each studied exclusively by certain sections of the Brahmanas and each of them had its relation restricted to only a definite Veda, like the Pratiśakhyas. For example, the Sutras of Gautama and Gobhila were accepted by the Chhandogya (Sama-Vedi) Brahmanas only; those of Vaśiṣtha by the Rig-Vedins; those of Śankha-Likhita by the Vajasaneyins; and those of Apastamba and Baudhayana by the Kriṣna-Yajurvedins. The fact of such limited acceptance afforded matter for reflection. So the question is whether each of these sutras is authoritative only for the particular sect by which it is accepted or whether they are equally authoritative for all people.

To this it has been made clear by Kumarila that the Smritis are assumed to be based on the Śrutis and as Śrutis are meant to be of universal application it is not correct to hold that Smritis should have only local authority. Kumarila concludes this section by stating that the injunction being always found to have "a universal application" we must conclude that the Dharmas of the Grihya Sutras and Dharma Sutras that are prevalent only among certain sections have a universal authority.[19] The Nyaya employed in arriving at this decision is that the capability of doing the acts laid down in the Smritis belongs to the people of all the castes and conditions inhabiting the whole country of Aryavarta except the blind, the deaf and the dumb who are precluded from such actions. Again, the principle of the Holaka-Adhikarana[20] which lays down that the Holaka enjoined for the Easterners is of universal application and authority, has been mainly used to justify this conclusion.

The researches of modern scholars show that the statement of Kumarila as to the local authority of Smritis was a fact. Though Gautama's Dharma Sutra does not form part of a Kalpa

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19 अपि वा सर्वधर्मत्वात् तन्न्यायस्य । Jaimini, I, iii-16.
तस्मात् सर्वधर्माधिकार–न्यायत्वात् विधानस्य व्यवस्थित–गृह्य–धर्मसूत्रनिबद्धधर्माणाम् अपि सर्वधर्मत्वम् । Kumarila's Vartika on, Ibid.

20 Vide separate chapter *infra*.

Sutra, it must have been connected with a Vedic school for the Gautamas are mentioned as a sub-division of the Ranayaniya branch of the *Sama Veda*; and Kumarila's statement that Gautama's treatise belonged to that Veda is confirmed by the fact that its twentysixth section is taken word for word from the *Sama-Veda.*[21] Kumarila states that in his time Vaśiṣtha's law book while acknowledged to be of general authority was studied by the followers of the *Rig-Veda* only. That Kumarila meant the present work and no other is proved by the quotations from it which he gives and which are found in the published text.[22] Similarly, Kumarila's statement that Śankha-Likhita was connected with the Vajasaneya school of the White Yajur Veda is borne out by the quotations from it which have survived.[23]

Kumarila's genius is clear from the fact that he applied the principle of the Holaka Adhikarana to the discussion of the authority of local Smritis. This matter is not mentioned by Śabara. Kumarila in a large measure anticipated article 44 of the Constitution of India and succeeded in effecting a uniform code of law for all Aryavarta.

The principle enunciated by Kumarila was followed in practice by the commentators and Nibandhakaras. The commentaries that generally follow the *Mitakṣara* are not the property of any one school. They have been cited in all the schools. The *Kalpataru* and *Madana Parijata* are referred to in Banaras and Mithila schools and also in the *Saraswati Vilasa* an authority of the Madras school. The references of the Digests and commentators to one another clearly show that all the treatises are the common property of all the schools.

It may be asked as to how the schools of law rose in spite of the principle enunciated by Kumarila. The answer is given briefly in the text books and decisions. "The commentaries and Digests modified and supplemented the rules in the Smritis by their own reasoning and in part in the light of *usages* that had grown up. They did their work so well that the commentaries and Digests have in effect superseded the Smritis at any rate."[24]

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21 Macdonnell's *Sanskrit Literature*, 1900, page 260. Sacred Books of the East, Vol. 2, *Gautama*, Chap. 26. Notes by G. Buhler on the entire chapter.

22 *Ibid*, page 261.

23 Ibid, page, 262.

24 Mayne's *Hindu Law*, 11th Edition, page 40.

Atmaram *vs*. Bajirao, 1935, 62 Ind. Appeals 139, at p. 143. Ramnad case. 12. Moor. In. App. 397 at p. 436. "Under the Hindu system of law clear proof of usage will outweigh the written text of the law."

Section 3—Authority of Kalpa Sutras

Ritual—Kalpa—which constitutes the chief contents of the Brahmanas was the first Vedanga to receive systematic treatment in special manuals called the Kalpa-Sutras. They arose out of the need for compiling the rules of the sacrificial ritual in a shorter, more manageable and connected form for the purpose of the priests. Kalpa-Sutras dealing with the Śrauta sacrifices taught in the Brahmanas are called the Śrauta-Sutras and those dealing with the domestic ceremonies and sacrifices of daily life, the Grihya rites, the Griha-Sutras. The Śrauta Sutras thus contain direction for the laying of the three sacrificial fires, new and full moon sacrifices, the sacrifices of the seasons, the animal sacrifices and especially of the Soma sacrifice with its numerous variations. The contents of the Grihya-Sutras are still more manifold. They contain directions for all usages ceremonies and sacrifices by virtue of which the life of the Hindu receives a higher sanctity (संस्कार) from the moment he is conceived in the womb till the hour of his death and still further through the death-ceremonies and passage of the soul. No less important is a third class of books directly connected with the Grihya-Sutras and probably originating as a continuation of them viz., the Dharma-Sutras i.e., text books which deal with Dharma. Dharma works deal with secular as well as religious law which indeed are inseparable. Lastly are the Śulva—Sutras which are directly attached to the Śrauta-Sutras and contain exact rules for the measurement of building of the place of sacrifice and the fire altars. Only in the Black Yajurveda we find the Kalpa-Sutras of Baudhayana and Apastamba containing all the four kinds of Kalpa-Sutras—Śrauta, Grihya, Dharma and Śulva.

Śabara mentions Maṣaka, Hastika and Kaundinya as the authors of Kalpa-Sutras forming the subject of discussion. Kumarila draws a distinction between Kalpa and Kalpa-Sutras. By Kalpa he refers to the bare statement of rules without any explanations or embellishments and he names Baudhayana, Varaha and Maṣaka while as the author of the Sutras he names Aśvalayana, Vaijavapi, Darhyayana, Latiya and Katyayana.

The Mimamsa Śastra takes up the Kalpa Sutras and discusses their authority and whether they are an authority independent of the Vedas.

To this the Mimamsa answers that the Smriti has been established in the previous section to be an authority on the basis of dependence on the Vedas. As regards the claim of the Kalpa-Sutras to be a self-dependent authority independant of the Vedas, it is established that the Kalpa-Sutras are not Śruti and therefore,

the self-dependent nature of the Śruti cannot attach itself to the Kalpa Sutras. This is based on three grounds :—

(1) There is no proper composition.[25] The Kalpa Sutras are not अपौरुषेय as the Vedas and one main distinction is that there is no accent at all in the Kalpa Sutras.

(2) The second reason is that there are no supplementary passages.[26] In the Kalpa Sutras we meet with such texts as "He appoints the priests. The priests appointed perform the sacrifice. They take their seat on the sacrificial ground." In all these there is no injunctive mood indicative of the चोदना of the Veda. Throughout the present tense is used. There are even no valedictory supplementary passages from which the injunction could be deduced.

(3) Kalpa Sutras contain directions contrary to what is contained in the Śruti. The Kalpa Sutras for instance, enjoin that on all the days the Amavasya should be performed while the Śruti declares that the Amavasya should be performed on the Amavasya day and Paurnamasya on the Paurnamasya day.

The oldest Sutra works are even in contents directly connected with the Brahmanas and Aranyakas. There are frequent quotations from the Brahmanas in the oldest Sutra texts. Even when there are no quotations the similarity of the Sutras with the Brahmanas in style and character is clear. The Śrauta Sutras, however, were written not on the basis of the Brahmanas but on the basis of a long oral tradition.[27]

Section 4—Conflict between Smriti and the Veda

The authority of Smritis in general having been established, a question may be raised :—How would it be in cases when there is a conflict between the Smriti and the Śruti?

The Smriti rule is that the whole of the 'Udumbara' post should be covered; and there is a conflict with the Śruti rule that one should sing a Saman touching the post. No touching of the post is possible when the whole of it is covered with a cloth.

The Smriti rule enjoins that one should remain a Vedic student for 48 years; and this is in conflict with the Śruti rule that one should instal the fire when a son is born to him and his hair is still black. If the Smriti rule is followed strictly he would not marry till he is 55 or 56 by which time his hair would cease to be

25 न असन्नियमात्—Jaimini, I. iii. 12.

26 अवाक्यशेषात् —Jaimini, I. iii. 13.

27 Winternitz *History of Indian Literature*, Vol. I, 1927, Section on Kalpa Sutras, pages 271 to 282. N. B.—It is no small credit to the Mimamsaka that he correctly discovered this twenty centuries before modern research and arrived at the same conclusion.

black and he could not instal the fire before marriage in which case the Śruti rule could not be followed.

It is necessary to see exactly how the conflict really arises between the Smriti and Śruti. In the first example of covering the Śruti text for touching is there. Then the Smriti text of the covering of the post begins to get its authority ensured by assuming a Vedic text for its basis. But finding the Vedic text which already exists, stating the rule to the contrary, the Smriti text does not become authoritative.

The Purvapakaṣin now argues: The Śruti text for touching the post is now already there. The Smriti text for covering the post will have a corresponding Śruti text assumed for its basis. Hence, we will have two Śruti texts for consideration viz., the Śruti text enjoining the touching and the Śruti text assumed as the basis of the Smriti text enjoining the covering. In the case of these two Śruti texts where is the conflict? The alleged conflict between Smriti and Śruti does not arise as there is really a conflict of two Śruti texts only. In the event of two Śruti texts conflicting there is the familiar example of the Yava and Vrihi texts resulting in an option. Similarly, there could be an option between the Smriti and the Śruti; and the Smriti text is therefore authoritative.

The Siddhantin is at great pains to show that the analogy of the actual Śruti text and the assumed Śruti does not stand on the same category as the case of two Yava and Vrihi texts resulting in an option. The conflict in the case of the Yava and Vrihi texts is in respect of two actually existing Śruti texts and hence, the option is the rule laid down in the Mimamsa Śastra. In the case of the Smriti text in question, the corresponding Śruti text has to be assumed ; but finding a Śruti text already quite contrary to that which has to be assumed, the assumption is not made and hence, the Smriti text is without any प्रमाण or authority.

Regarding the Sruti Yava text, as a matter of fact, the Vedic text prescribing Yava as a substance to be used is already there and has *not got to be assumed*; and certainly when the text is already there, nothing could be said against it. In the case of the Yava and Vrihi both the texts are already there. The two are two distinct sentences; one speaks of the Yava only as the substance for the sacrifice; and the other of the Vrihi only as the substance; and when something is distinctly mentioned as a sentence it cannot be put aside. For this reason, in the case of Yava and Vrihi, it is only right that option should be admitted. Similarly in the case of the two Samans, Brihat and Rathantara, option has to be admitted.

It is for this reason that it has been declared that the Smriti conflicting with the Śruti is not trustworthy. Consequently, what has been said in the Smriti regarding the covering has to be disregarded. This is the meaning of the Siddhanta Sutra: "When there is a conflict between the Smriti and the Vedas, the Smriti should be disregarded; because it is only when there is no such conflict that there is an assumption of the Vedic text in support of the Smriti."[28]

The Siddhantin adds another argument: "And because we find motives."[29] Some greedy priests being desirous of having a large piece of cloth covered up the whole post at a performance. This was what gave rise to the Smriti rule that the whole post should be covered up.

Some people with a view to conceal their want of virility remained religious students for 48 years; and this was what gave rise to the Smriti rule enjoining such a course. For this reason also no authority can attach to the Smriti rule which is found to have a source in such motives.

The principle of this Adhikarana stands on firm ground. The reasons adduced for rejecting the authority of the Smriti when it conflicts with the Śruti are to be accepted without any qualification.

The only subject of contest between Śabara and Kumarila lies in the choice of the examples. Kumarila shows that the conflict in the above instances between Smriti and Śruti is only apparent and has no application in fact.

The example of touching the post while singing and covering the entire post shows that there is no conflict at all. The entire post may be covered up with cloth leaving only a small spot for touching the post. Thus both the rules are satisfied without any conflict.

The other Smriti rule of the Brahmacharya for 48 years is not a universal absolute rule but the rule is only for those who are Naiṣthika Brahmacharins. In the language of Mimamsa, it is a Niyama Vidhi.

The reason alleged for the rule having its origin in the greed of the priest is also without foundation. Kumarila rightly observes that it is an ordinary cloth which is enjoined and not a costly cloth or piece of silk which the greed of the priest might have easily dictated. Covering the post with cloth is a common feature in many Śrauta sacrifices and Smriti ceremonials.

Again, Śabara in instancing the 48 years Brahmacharya rule mistook it for an absolute rule enjoining all Brahmacharins; and in tracing it to the want of virility we should state that in

28 विरोधे तु अनपेक्षं स्यात् असति हि अनुमानम् Jaimini, I. iii.3.
29 हेतु-दर्शनात् —Jaimini, I. iii.4.

trying to find out an example for the Sutra, imagination and humour got the better of the austere Bhaṣyakara of the Mimamsa Śastra.

Jaimini's two sutras for rejecting the Smriti authority in cases of conflict with Śruti are capable of strict scientific scrutiny. It was held in Section 1 of this Chapter:

(1) Smriti is authoritative because of its dependance on Śruti texts, and

(2) Smriti writers are human authors however high a rank they might have attained.

In this section it is held:

(1) When the Smriti text conflicted with the Śruti the Smriti should not be considered as authoritative; for it did not reveal its dependence on the Śruti text.

(2) The second ground on which any human composition could be set aside is on the discovery of human frailties of which लोभ may be taken as a very compendious expression.

Thus the two reasons for not accepting the Smriti authority are given in the two sutras noted above. Thus Jaimini exhausted all the possible grounds on which a Smriti could ever be set aside.

Jaimini really should have framed the Sutra mentioning the second ground of लोभ as a result of making the reasons for rejecting a Smriti rule exhaustive like a scientific treatise and not with a view that the Smritis extant afforded any examples of लोभ or the like.

Śabara thought it his duty to find out some examples for the application of the above two Sutras[30]; and he gave the same examples as illustrating the different reasons underlying Sutras 3 and 4.

But as Kumarila has shown, the illustrations given by the Bhaṣyakara do not fit in at all with the rules.

Even if there were no illustrations the general rule enunciated in this Adhikarana by Jaimini and accepted by both Śabara and Kumarila would be valid.

Instance of a real conflict

While discussing the question of the rights of women to perform a sacrifice it is argued by the Purvapakṣin that a woman cannot perform a sacrifice as she has no property of her own and that what she earns belongs to her husband. The Purvapakṣin relies on the following text of Manu:[31]

भार्या दासश्च पुत्रश्च त्रयो निर्धना एव ते।
यत् ते समधिगच्छन्ति यस्य ते तस्य तद्-धनम्॥

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30 Sutras quoted above in footnotes 28 and 29.

31 VIII, 416.

"The wife, the slave and the son are all surely devoid of property; whatever they earn is the property of him to whom they themselves belong."

The Siddhantin points out that the famous Vedic text स्वर्गकामो यजेत applies equally to all men and all women, because both sexes have a desire for Swarga; this construction is established by Śabara as the correct one and is accepted by Kumarila; and this does allow a woman the right to perform a sacrifice.

Thus we find that the Smriti denies the woman's right to property. But the Śruti enjoins her to perform a sacrifice and thereby implies as a necessary basis for the performance of the sacrifice her ownership of the property. Thus a case of conflict between the Smriti and the Śruti has arisen.

In such a case the rule enunciated in this section applies to the Smriti text and Śabara concludes :—

तस्मात् फलार्थिनी सती, स्मृतिम् च अप्रमाणीकृत्य द्रव्यं च परिगृह्णीयात् यजेत च इति ।

"The woman who desires the result of Swarga following from a sacrifice should set aside the authority of the Smriti, should acquire property and should then perform the sacrifice."

As a matter of fact the woman is actually connected with property. This is clear from the following words addressed to the bridegroom at the time of marriage :—

धर्मे च अर्थे च कामे च न अतिचरितव्या ।

"In matters relating to Duty (religious acts) and to *property* and to pleasure the wife should not be ignored."

All that Manu's dictum means is that the wife should not behave in such a way regarding her property as if she were quite independent of her husband.

In this very discussion another argument is brought against the woman's right to perform sacrifices viz., that the woman is bought and sold as property because a cow and a bull have to be given by the bridegroom to the bride's father in the Arṣa form of marriage.[32] But the above argument is rejected and it is pointed out that marriage is a religious function, that marriage could not be a sale in the ordinary sense of the term even in the Arṣa type of marriage, that an article is said to be sold when its price is a fluctuating factor—sometimes more and sometimes less, that in the case of the Arṣa marriage religion (Dharma) enjoins

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32 एकं गोमियुनं द्वे वा वरादादाय धर्मतः ।
कन्याप्रदानं विधिवदार्षो धर्म स उच्यते ॥ Manu, III, 29.

When the father gives away his daughter according to the rule, after receiving from the bridegroom for the fulfilment of the sacred law, a cow and a bull or two pairs, that is called the Arṣa form of marriage.

the gift of a cow and bull irrespective of the girl being ugly or handsome and that the so-called 'price' is a fixed term. Thus the woman is not bought or sold as property in any sense in the institution of marriage.[33]

Cases where Smriti apparently overrides the Vedas

After having fully discussed the authoritative nature of the Smriti and having made it clear that Smriti has no authority when it conflicts with Śruti, we now proceed to what may be roughly called as cases of Smriti over-riding Śruti.

The Smriti rules dealt with here are :—

(1) An act should be done after sipping water (आचमन).

(2) An act should be done while wearing the Yajnopavita.

(3) One should perform the act with the right hand.

The Purvapakṣin states that the above Smriti rules would militate against the order of the acts laid down in the Vedas. For instance, if one were to perform the आचमन between the making of the 'Veda' (meaning a bundle of Kuśa grass) and making of the 'Vedi' (an altar between two fires) it would militate against the Vedic text 'One should make the Vedi after making the Veda." The order prescribed is that the making of the 'Veda' should be followed by the making of the Vedi and if the आचमन were to be performed between the two, the order would be infringed.

The Siddhanta states : But when no motive can be detected they should be recognised as useful.[34] The right view is that when the Smriti texts like these under consideration are not found to have been prompted by an improper motive, they must be accepted as authoritative. आचमन is an act while the order of sequence is only a quality of (accessory to) the act. An act cannot be omitted for the sake of an accessory..

Another reason is given for accepting the Smriti injunctions. Acting with the right hand and wearing the sacrificial thread constitute purity and such things are not regarded as interruptions at all; because purity or cleanliness is a necessary adjunct to all sacrificial acts (Śrauta and Smarta).

From all this it follows that the Smriti rules relating to all these acts— आचमन, wearing Yajnopavita and using the right hand are authoritative i.e., trustworthy.

That is why it is stated that tradition (Smriti) is weaker than Revelation or Śruti, but Smriti prevails over Revelation when Smriti is being supported by a thing to be done. The आचमन is a

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33 This matter is very fully dealt with in the Chapter on "Woman's right" in the next part Mimamsa Jurisprudence—Fundamentals of Mimamsa.

34 अपि वा कारणाग्रहणे प्रयुक्तानि प्रतीयेरन् Jaimini, I. iii.7.

thing (पदार्थ) and is more important than an accessory (गुण) such as, order (क्रम). Hence, between the making of the 'Veda' and the making of the 'Vedi,' whenever आचमन is necessary it has to be done and the order of the Vedic rites which is a mere accessory (गुण) has to be abandoned. Kumarila concludes this portion of the discussion with a worldly example. "Even strong men of the city or country are overcome by even very weak men who are supported by the king."[35]

A modern writer like Edgerton agrees with the reasoning of the Mimamsaka and states that a thing (पदार्थ) is something to be done, a primary matter, whereas order is a secondary matter being merely an inherent धर्म in things.[36]

Thus the Mimamsaka establishes that the rule of Śruti prevailing over Smriti has no application to possible or imaginary cases of conflict by stretching the point too far in favour of the Śruti.

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35 *Tantra Vartika* on I, iii-4.

36 *Apadevi*—Translation by F. Edgerton, vide note on pages 77 and 78.

Chapter IV

ITIHASAS AND PURANAS

The Itihasas and Puranas are placed on the same footing as Arthavada passages by Kumarila. In view of the importance of the subject and more so in view of the prevalent misunderstandings about the authority of these it would be necessary to set forth all the facts in detail.

The main basis on which an Arthavada is held authoritative is mentioned in the following way:

"Inasmuch as they are syntactically connected with the injunctive passages, the Arthavada passages would be authoritative by reason of their serving the purpose of praising what has been enjoined."[1]

The main contention of the opponent is that the Arthavada passages cannot have any authoritative bearing upon Dharma, because by merely describing settled facts they have no connection with anything to be done. It has been pointed out in this section that the contention that these passages have no connection with actions to be performed is not true. As a matter of fact we find that all the Arthavada passages are capable of being construed along with one or more injunctive passages; and the purpose they serve is by praising the action enjoined in the sentence with which they are related. For instance, we have the injunction: "One who desires prosperity should sacrifice the श्वेत (*white animal dedicated to Vayu*)." This naturally leads to the question as to why this animal should be sacrificed to Vayu. And it is in answer to this question that we have the Arthavada "Vayu is the swiftest deity; and Vayu carries the performer very swiftly to prosperity."

The above explanations hold good in the case of the Itihasas and Puranas. There is the *Vidhi* which distinctly enjoins that the *Mahabharata* and other works should be recited and expounded to men of all castes: "One should recite and should make known (expound) these before persons of the four castes."[2] This shows that the *Mahabharata*, *Ramayana* and the *Puranas* are the means of accomplishing the पुरुषार्थाः (desired ends of life); and when we proceed to seek for this desirable end, we do not accept that the mere recitation of the *words* would bring about the results. The Parayana (recitation) of the text is, no doubt, a first step; the end in view is the understanding of the Vidhis therein and acting

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1 विधिना तु एकवाक्यत्वात् स्तुत्यर्थेन विधीनां स्युः Jaimini I, ii-7.

2 "श्रावयेत् चतुरो वर्णान्" Quoted by Kumarila and Śankara. The text is found in the *Mahabharata*.

in accordance therewith. We find therefore, that the true result lies in a full comprehension of the causes of Dharma, Artha, Kama and Mokṣa and also their contraries Adharma, Anartha, Duhkha and Samsara; for we should acquire those of the first set and avoid those of the latter.[3]

Kumarila further adds that we find in the Itihasa and Puranas themselves direct mention of the injunctions throughout the work in different contexts. For example, in the *Mahabharata* the sections on Dana, Rajadharma and Mokṣadharma are full of such Vidhis.[4] As for the other portions containing descriptions of events and stories if we accept them in the literal sense, then with reference to these at least, the injunction of reciting and expounding them would become useless as no purpose could be served by these mere descriptions. And as these descriptions have been inserted with the sole purpose of such praise or depreciation they need not be necessarily taken as absolutely correct with regard to facts.

Guided as they were by the study of the Vedas, Valmiki, Vyasa and others composed their works on the same lines as the Vedas; and as those for whom these works were intended were persons of varying degrees of intelligence and diverse tastes, it was only proper for them to insert every kind of matter in their works so that they might be of use to all men. Hence it is that in certain points we find pure injunctions, while in others the injunctions are mixed with Arthavadas; and among these latter too some have only brief Arthavadas; while others have extensive ones. The sole motive for this diverse procedure lies in the making of the work attractive to all men.[5]

श्रावयेत् चतुरो वर्णान् इति च इतिहासपुराणाधिगमे चातुर्वर्ण्यस्य अधिकारस्मरणात् ।
Śankara Bhaṣya on I, iii, 38.

It is to be noted that Kumarila and Śankara both treat the text as a *Vidhi* enjoining the expounding of the Itihasas and Puranas to all castes. It is a *right* of the four castes *qualifying* them for acquiring the knowledge of the Itihasas and Puranas; and looked at from the other side it is a *duty* on the part of the Brahmanas compelling them to impart such instruction to all the four castes.

3 एवं भारतादिवाक्यानि व्याख्येयानि । तेषाम् अपि हि "श्रावयेत् चतुरो वर्णान्" इत्येवमादि-विध्यनुसारेण पुरुषार्थान्वेषणात् अक्षरादि व्यतिक्रम्य धर्मार्थकाममोक्ष-अधर्मानर्थ-दुख:संसारसाध्यसाधनप्रतिप्रति: उपादानपरित्यागाङ्गभूता फलम् । Kumarila's *Vartika* on I, ii, 7.

4 दान-राज-मोक्षधर्मादिषु केचित् साक्षात् विधय: केचित् पुन: परकृतिपुराकल्परूपेण अर्थवादा: Kumarila's *Vartika* on I. ii. 7.

5 वेद-प्रस्थानाभ्यासेन हि वाल्मीकि-द्वैपायन-प्रभृतिभि: तथैव स्ववाक्यानि प्रणी-

Some of these injunctions and prohibitions in the *Mahabharata* and the like are based directly upon the Veda; while others are based upon considerations of ordinary pleasure and pain as experienced in the world. Similarly, among the Arthavadas too, some are those that appear in the Veda. Some are based upon ordinary experience while there are some that are composed as in poetry. But all of them have an authoritativeness based on the fact of their praising the enjoined action.[6]

As for those portions of the *Mahabharata*, Puranas etc., which however, are not capable of being taken along with any injunction some of them are such as give pleasure in the mere listening to them—such as the description of hills like Gandhamadana etc. And some, as for instance, the description of wars serves to encourage the brave as well as the coward and thereby serve a distinctly useful purpose for the rulers of men. In those cases, however where none of these is possible as in the hymns to the deities, we can assume an unseen transcendental result.

After setting out the above passages dealing with the Itihasas Kumarila concludes his section on the authority of Arthavadas. A point deserving special notice is that Kumarila tries to connect the stories in the *Mahabharata* etc., with those in Vedic literature. In this respect he has anticipated the modern scholar who tries to find out the connection between the Itihasas and the Vedic literature. For example, a modern historian states—"The kernel of the *Mahabharata* seems to be the victory of the Pandus, helped by Krishna and the Panchalas, over the Kurus proper, the sons of Dhritarashtra Vichitraviya, a king mentioned already in the *Kathaka* recension of the *Yajur Veda*......Of the leading figures on the side of victors the name of Krishna, son of Vasudeva and Devaki is mentioned in the *Chhandogya Upanishad* and the latest book of the *Taittiriya Aranyaka*. The name of another victor, Arjuna, is alluded to in the Vajasaneya recension of the *Yajur Veda* and *Satapatha Brahmana*."[7] Kumarila would surely have endorsed the results carried on these lines of research.

Section 2—Itihasas and Puranas as Smriti

After having treated the authority of Itihasas and Puranas on the basis of Arthavada, Kumarila directly deals with them

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तानि । प्रतिपाद्यानाम् च विचित्रबुद्धित्वात् युक्तम् एव एतत् । इह केचिद् विधिमात्रेण प्रतिपाद्यन्ते । अपरे सार्थवादेन अपरे अल्पेन अर्थवादेन, अपरे महता । सर्वेषां च चित्तं प्रहीतव्यम् इत्येवम् आरम्भः । Kumarila's *Vartika* on I· ii. 7.

6 तत्र तु केचिद् विधिप्रतिषेधा: श्रुतिमूला: । केचिद् अर्थसुखादिषु लोकमूला: । तथा अर्थवादा: केचिद् वैदिका एव, केचिद् लौकिका एव, केचित् तु स्वयम् एव काव्यन्यायेन रचिता: । सर्वे स्तुत्यर्थेन प्रमाणम् । Kumarila's *Vartika* on I. ii. 7.

7 *An Advanced History of India* by R. C. Majumdar, H. C. Raychaudri and Kalikindar Datta, 1948, pages 93-94.

again in the discussion of Smritis. Among the Smritis themselves such portions as are related to Dharma and Mokṣa have their origin directly in the Veda; while those that have wealth and pleasure in view are based upon ordinary experience of the world. This rule holds good respecting the exhortations contained in the Itihasas and Puranas.

The description of the various parts of the earth serves the purpose of pointing out and distinguishing the places fitted for the performance of Dharma and places which are unfit and also for the proper experiencing of the effects of such performances; and these are based partly on the Veda and partly upon the common experience of the world.

As for the histories of the various royal families, Kumarila holds that they serve the purpose of differentiating the people of different castes and are based upon Direct Perception and Tradition.

Again, the description of the various measures of space and periods of time serves the purpose of regulating the oridinary practices of the world as also the sciences of Astronomy and Astrology; these are based upon direct perception as also upon inferences deduced from mathematical theories and prevalent practices.[8]

Lastly, the descriptions of the state of things to be in the future as recounted in the Itihasas and Puranas have also their origin in the Veda itself as they are based on the knowledge of the nature of the various periods of the eternally revolving time and the manifold results of righteous and unrighteous conduct.[9]

On these grounds the authority of the Itihasas and Puranas is established as Smriti—as a source of Law.

Section 3—Authority of the Six Angas of the Vedas, Mimamsa and Science of reasoning

Kumarila has also mentioned the authority of the six Angas of the Vedas, Mimamsa and science of reasoning. It would be very useful to set forth hereunder his views.

"(1) *Śikṣa*—In the Śikṣa the differentiations of the organs of pronunciation of letters, their accents and time etc., have their perceptible uses; while the assertion that if a sacrifice is performed with a full knowledge of these details there follows a particular result is based on the Veda. For example, if the Mantra is recited without correct accents or pronounciation it kills the sacrificer.

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8 देशाकालपरिमाणम् अपि लोकज्योतिःशास्त्रव्यवहारसिद्ध्यर्थम् दर्शनगणितसप्रदायानुमानपूर्वकम् । Kumarila's *Vartika* on I. iii. 1-2.

9 भाविकथनम् अपि तु अनादिकालप्रवृत्तयुगस्वभावधर्माधर्मानुष्ठानफलविपाकवैचित्र्यज्ञानद्वारेण वेदमूलम् । Kumarila's *Vartika* on I. iii. 1-2.

(2) *Kalpa Sutras*—In the case of Kalpa Sutras we have explanations of the real purport of the injunctions deducible from the rules that are found scattered in the various branches of the Veda intermixed with Arthavadas; and as such these explanations have their origin in these latter. In these we also meet with certain rules of conduct to be followed by the priests; and these are based upon considerations of their convenience and as such have their origin in ordinary experience.

(3) *Vyakarana*—In the case of Vyakarana the knowledge of correct and incorrect forms of words has a perceptible use exactly like a knowledge of the differences as among trees; and as such it is based upon direct sense perception; and the assertion —that the use of correct words fully accomplishes the results of the action performed while that of incorrect words creates obstacles in its fruition—has its origin in the Veda.

[4. *Nirukta*—The case of *Nirukta* is similar to that of Vyakarana as it serves the purpose of finding out the sense in which a word has to be correctly employed and hence has not been mentioned separately].

(5) *Chhandas*—As for the science of Chhandas the correct differentiation of the Gayatri and other metres is found to be of perceptible use in the Vedas as well as in ordinary experience; and as such is based upon direct perception. While the assertion that a certain result follows from a sacrifice when performed with a full knowledge of the *mantra* employed is founded upon the Veda. The Vedic text referring to one who at his own sacrifice or at the sacrifice of others makes use of a Mantra or a Brahmana of which he does not know the Riṣi, metre and Deity etc., mentions a distinctly undesirable result as following from such conduct.

(6) *Jyotiṣa*—In the case of the science of Jyotiṣa the knowledge of the dates and asterisms—as computed by means of the various periods of time as divided into regularly revolving cycles and by a knowledge of the revolutions of the sun and the moon—is based upon inferences deduced from such mathematical theories as have been handed down from time immemorial. In this science also we meet with the declarations that certain good and evil results as following from previous good and bad deeds are indicated by the good and bad position of the planets at the time of one's birth, and it also lays down certain expiatory rites with a view to ameliorate the planetary conditions; and through these rites the science comes to have its origin in the Veda. The above remarks also apply to the science of Palmistry and Architecture etc.; with regard these two, however, we may assume such direct injunctions as that when one comes across such signs in a

man's body or such remarks in the houses, he should take these signs to mean such and such a thing.

(7) *Mimamsa*—As for Mimamsa it is based upon the Veda, upon ordinary experience and also upon direct perception and inference etc., Based upon these and reared up by an unbroken line of scientific teachers, no single person could ever have been able to compile such vast collection of arguments.

(8) *Science of Reasoning*—The same may also be said of the science of reasoning. The meaning of the Vedic passages is expressed by means of the meaning of words; but in ordinary usage, the denotation of words is found to be mixed up with the several factors of Class (Property, Action and Name); and these can be directly discriminated never by themselves but only by means of sense perception and the rest as distinguished by their respective characteristics and as put forward by their learned exponders. The Veda itself being scattered over many branches can be rightly ascertained and made to serve its purpose only by these means of right notion; consequently, all these should be properly learnt by the help of the Science of Reasoning. This has been declared by Manu also who says "Sense perception, Inference and Verbal authority are based upon various scriptures—these three should be well learnt by one who desires a knowledge of pure Dharma"[10] and "He who approaches Dharma by means of reasoning, he alone and none else understands it."[11] All these point out to the necessity of the Science of Reasoning. For the most part now-a-days people are much more prone to unrighteousness; and thereby have their intuition blurred by ignorance, and take to evil paths. Consequently with a view to set these people right what the Science of Reasoning—as based upon experience, Arthavada, Veda (direct injunctions) and the Upaniṣads—does is to point out the trend of misconception and also of the correct conclusion with regard to a certain point, then to lay down the arguments in support of both and lastly to arrive at the correct conclusion, after having fully considered the comparative strength of the arguments advanced from both sides. If it were not for such systematic argumentations, various arguments would be appearing to the people at random and would be giving rise to all sorts of misconceptions through sheer ignorance of the various phases of the question. And if the correct conclusion were not properly shown deduced from the proved premises and if only the arguments from both sides had been put down, people would be

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10 प्रत्यक्षं चानुमानं च शास्त्रं च विविधागमम् ।
त्रयं सुविदितं कार्यं धर्मशुद्धिमभीप्सता ॥ *Manu.* XII. 105.

11 आर्षं धर्मोपदेशं च वेदशास्त्राविरोधिना ।
यस्तर्केणानुसंधत्ते स धर्मं वेद नेतरः ॥ *Manu.* XII. 106.

employing their own mistaken judgments in the choosing of the same arguments and in rejecting some and accepting others without reference to any definite standard."[12]

Section 4—Itihasas and Puranas in the Law Reports and Text books

Muthuswamy Ayyar J (Reported in the Siva Ganga Zemindary case on appeal from the judgments of Morgan C. J. and Innes and Muthuswami Ayyar JJ—I. L. R. 3 Madras 290 P. C.) refers to the several statements in the *Ramayana* regarding the impartibility of the kingdom and that the kingdom should be ruled by one king. *Colebrooke's Digest*[13] is also quoted in which there is a long discussion about impartibility in the *Ramayana* and *Mahabharata*.

The *Mahabharata* Śloka in the *Viṣnusahasranama* section beginning with एको विष्णुः is quoted by Patanjali Sastri J in I. L. R. 1947 Madras 47. Sadasiva Ayyar J quotes two slokas from the *Bhagavata* in I. L. R. 38 Madras 556.

Mayne has the following :[14]

"While the Puranas may perhaps be received in illustration of the rules contained in the Smritis they have little value in the domain of civil law. Mitra Misra in his commentary on Yajnavalkya Smriti says that the Puranas are not authoritative in law." The following is quoted as the authority in support of the above :—

"Yajnavalkya Smriti with Viramitrodaya. Gharpure's translation p. 29. Sarkar (Hindu Law 7th Edition 22) and Prof. Wilson think that while the Puranas are not authoritative they can be received in explanation or illustration."

As to Mitra Misra's statement that Puranas are not authoritative, it may be pointed out here that what he means is that the Smritis are directly authoritative though based on the Veda, and that the Puranas etc., are *indirectly* authoritative as they are removed one step further in their authority. The Puranas contain discription of heaven hell etc. and contain stories. These are authoritative as Arthavadas. In this way, Nyaya and Mimamsa are authoritative as they deal with Tarka or the Science of reasoning or ratiocination. Sikṣa and the other Vedangas are auxiliary helps to the Vedas each in its own way. Thus all these sources of Dharma do help the Vedas and are thus authorities but *not directly*. This is exactly what is meant by "न साक्षात्." The Smritis also are based on the Vedas but since the Smritis contain the rules of law the Smritis are *directly* authoritative.

12 Ganganatha Jha's translation of *Tantra Vartika* pp. 119-121. *Purva Mimamsa in its sources*. pp. 218-220

13 Vol. I, pages 415 to 420.

14 *Hindu Law* 10th Ed. revised by Srinivasa Ayyangar.

In conclusion we have to state that the Puranas are authoritative. Especially in the spheres they deal with, their authority is incontestable. For example, Hemadri's *Danakanda* and Lakṣmidhara's *Kritya Kalpataru*, Hemadri's *Vratakanda* and Lakṣmidhara's *Tirtha Kalpataru*, the Nibanda works dealing with *Dana*, *Vrata* and *Tirthas* are quoting the Puranas in such profusion that they appear to be a string of quotations from the several Puranas.

In the light of the unanimous verdict of scholars mentioned in the footnote given below we need not criticise the view of Wilson or of Sarkar Sastri quoting and following Wilson. Wilson's views as also Sarkar's were framed at a time when the treasures of the Puranas were not sufficiently laid bare by scholars. We have thus established conclusively how the views of Kumarila on the Puranas have been accepted by modern scholars in the East and in the West.[15]

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15 1. *Macdonell—History of Sanskrit Literature* 1900.

The land grants found in various parts of India show that in the middle of the 5th century the *Mahabharata* already possessed the same character as at present that of a Smriti or Dharma Shastra. We are justified in considering that the great epic had become a didactic compendium before the beginning of our era.

2. *Jolly—Hindu Law and Custom*, 1928, English translation:

The two great epics particularly the *Mahabharata* are often quoted as sources of law exactly in the same manner as the Smritis. That the Mahabharata must have possessed its present character of a colossal Smriti already about 300 to 500 A.D. has been proved by Dr. Buhler. According to the united evidence of Bana in the Kadambari and an inscription from Kamboja it used to be recited like the Ramayana in the temples of India and greater India already about 600 A. D. for the edification of the faithful.

3. *P. V. Kane. History of Dharma Sastra*, Vol. I, 1930.

The Ramayana is pre-eminently a Kavya; yet on account of its noble ideas it was almost as popular as the Mahabharata and is relied upon as a source of Dharma in the Nibandhas though much less frequently than the other great epic.

4. *Winternitz—History of Indian Literatiure*, Vol. I, 1927.

It is proved by literary and inscriptional evidence that already by 500 A. D. the Mahabharata was no longer an epic but a sacred text book on religious discourse and was on the whole not essentially different in extent and contents from the work we have at present. The two portions of the Śanti Parvan (Raja Dharma and Apad-dharma) and the Anuśasanika are essentially nothing but a manual of law. Indeed there are large portions in this book which contain nothing but quotations or exact parallels to the well known book e.g., that of Manu.

Chapter V

AUTHORITY OF CUSTOM

The authority of Śruti—Revelation and Smriti—Dharma Śastra has been established. We now pass to the authority of सदाचार or custom, the third in rank among the heirarchy of the Sources of Dharma.

At the outset it is necessary to remember the stage at which the Mimamsa Śastra discusses Custom and its authority.

There is the historical school of jurisprudence in the West headed by Savigny which emphasises the spirit of the people, the '*Voksgeist*"—as the basis of all law. The central question was "how did law come to be?'. Law evolved, as did language, by a slow process and just as language is a peculiar product of a nation's genius, so is the law.

Applying this principle to Hindu law, Apastamba's first Sutra: धर्मज्ञसमयः प्रमाणम्, वेदाश्च, scholars have held, seems to be reminiscent of the origin of all Law in Custom and Convention before it was defined and crystallised in the form of rules of state, of unconscious evolution that preceded that of conscious law-making. The beginnings of legal rules have to be sought in Non-litigious custom. Later law also recognises the validity of custom; but there is a marked distinction between the *original* body of customs which in all communities was the basis of the law and *later* or *local* customs which were recognised only under special conditions. In the process of its transformation into 'law,' the original body of custom got defined and reshaped by tribunals, lawyers and writers. This is what happened in India when the Smritis took the place of unrecorded custom.[1]

It is in the second sense—in the second stage of custom's existence that the Mimamsa writers take up the discussion of the place and scope of custom. For by the time that Jaimini wrote the Mimamsa Sutras, Vedas and the Dharma-Śastras had definitely taken their rank and precedence as Sources of Law. In this stage, custom or सदाचार is disccussed to rank as the third and next source of law.

In view of the importance of this branch of study in any branch of Jurisprudence it is necessary to note the contributions of the Mimamsa writers in the creative period of the Mimamsa Śastra.

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1 Sir S. Vardachariar—*The Hindu Judicial System*—Section 12, *Sources of the Hindu Law*, page 37.

Kumarila discusses the general acceptance of customs before dealing with the place of local customs.

The possible objections to the reception of custom as a source of law are first dealt with below :—

Among good men also we find some behaving contrary to the law just like the doctors leading unhealthy lives; and as such their practice fails to command full confidence. Even in the practices of "good men" recognised as such in the Dharma Śastras and Puranas we often find a transgression of Dharma and also certain bold excesses, as in the case of Prajapati, Indra, Vaśiṣtha, Viśwamitra, Yudhiṣthira, Kriṣna Dwaipayana, Bhiṣma, Dhritaraṣtra and others as also of many good men of our own days.

For example, we find Kriṣna Dwaipayana who was under the vow of lifelong celibacy brought forth children from the wives of his brother Vichitravirya. Bhiṣma led a life contrary to all caste-regulations; and did an irregularity in performing sacrifices like Rama even though he (Bhiṣma) was unmarried.

Among people of modern days we find the people of the South marrying the daughters of their maternal uncles.

Then again, the practices of the good people of different countries are mutually contradictory.

And further, people think those people as good whose conduct is good; and they hold that conduct to be good which consists of the acts of good people; and thus there being an inter-dependence none of the two can be definitely ascertained.

It may be urged that Manu and others have also spoken of the practices of good men as an authority for Dharma; but then they have also mentioned the agent's own inner satisfaction as having an authority; and certainly there can be no fixity to this satisfaction, because we find as a matter of fact that different people have different causes for inner satisfaction on account of the diversities in their habits and dispositions. The people of the South are happy for example when they get a chance of marrying the daughter of their maternal uncle;[2] while other people are averse to such acts, considering them to be most sinful. Again, the practices of good men are not included in the fourteen sources of Dharma.

To this formidable array of objections Kumarila gives his answer as follows :—

When we find that certain actions are performed by good men and we cannot attribute them to any such perceptible motives as greed and the like, they should be accepted as Dharma. Such actions as are performed either for the maintenance of the body or

2 स्वमातुलसुतां प्राप्य दाक्षिणात्यस्तु तुष्यति। Kumarila's *Vartika* on I.iii.7.

for one's mere pleasure or for some material gain are not considered by good people as Dharma. It is only men's actions that are held by the good people to be Dharma and are performed as such that are accepted as Dharma; because the persons that perform these are the same as those who perform the sacrifices in the Veda.[3]

To the class of actions as are held by good people to be Dharma belong the following actions: Charities, Japa, Homa, the offering of the oblations to the mother, such celebration as the Śakradhwaja and other such festivities in connection with various temples, the keeping of married girls upon certain strict observances during the four days of marriage, Illuminations, the giving away on the first day of the month of sweetcakes and other uncooked food, the various festivities held on the seventh and last days of Magha and the first day of Phalguna as also those held in honour of spring time; and the authority for all this cannot lie anywhere else except in the Śastra.[4]

The authors of the Smritis in declaring as authoritative the practices of good men and the usage of particular communities and castes in keeping with the scriptural teachings admit the general authoritative character of such of these as not contrary to the teaching of the Veda. (And the aforesaid festivities have the support of the Smritis and the Vedas).

Inasmuch as in the chapter on Holidays are found in the Smritis the following, e.g., 'festivities should be held after breakfast,' this serves as the authority for all festivities in any town or country.

In the Veda too we have the passage in connection with the Mahavrata "the Hotr priest gets upon the swing and sings" and in continuation of this we read: "When people are holding a feast they get upon the swing" and this mention of the feast serves as an authority for the aforesaid festivities.

It has been urged above that inasmuch as Dharma and

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3 धर्मत्वेन प्रपन्नानि शिष्टैः यानि तु कानिचित् वैदिकैः कर्तृसामान्यात् तेषां धर्मत्वम् इष्यते । —Kumarila's *Vartika*.

It is to be noted that the same term which Jaimini uses for establishing the authority of Smritis is also used by Kumarila for establishing the authority of custom. *Jaimini's Sutra*, I. iii. 2. is अपि वा कर्तृसामान्यात् प्रमाणम् अनुमानं स्यात् ।
Śabara's explaining कर्तृसामान्यात् in the said Sutra as कर्तृसामान्यात् स्मृति-वैदिक-पदार्थयोः is significant and this also should be held to have been followed by Kumarila Bhatta.

4 प्रदानानि जपो होमो मातृयज्ञादयस्तथा । शक्रध्वजमहायात्रा देवतायतनेषु च ॥ कन्यकानां च सर्वासां चतुर्थ्याद्युपवासकाः । प्रदीपप्रतिपत्दानमोदकापूपपायसाः ॥ अग्निपक्वमाघसप्तमी-पौर्णमासी-फाल्गुनीप्रतिपत्-वसन्तोत्सवादीनाम् नियमक्रियाप्रामाण्यम् न शास्त्राद् ऋते किञ्चिद् अस्ति । —Kumarila's *Vartika* on I. iii. 7.

Adharma are treated of with any degree of authority only by the fourteen sources enumerated above (Vedas—six Angas—Purana, Nyaya, Mimamsa and Dharma Śastra) the practices of good men not being included in these cannot be admitted to have any authority.

But this objection has already been set aside by the fact of the possibility of the inference of Vedic texts in support of the said practices.

Nor can it be held that the assertion of the Smriti that the practices of good men have an authority in connection with Dharma is without any foundation; because when we find pretty lengthy declarations of the Smritis to be supported by the Veda, is is no wonder that we cannot lay our hands upon the Vedic texts (though they really exist) corroborative of such brief assertions as the one declaring the authoritative character of such practices. And it is quite possible for us to infer Vedic texts exactly like those in the Smritis.

Though the external forms of the practices are recognised by sense-perception exactly like the preparing of the curd, the milking of the cow and the like, yet the fact of their bringing about particular results (in the shape of Heaven etc.) cannot be got at by any other means save the Śastra. For the matter of that, even in the case of sacrifices, a perception of their external forms does not stand in need of any scriptural authority. It is only the fact of their leading to certain definite results that, being not perceptible by the senses, stands in need of such authority.

Nor can the theory of inter-dependence between good men and their actions hold good. It is not necessary that on every occasion the scriptural authority for the actions should be recalled. The good people have from time immemorial acted in keeping with the scriptures and hence people coming to recognise the authoritative character to such practices take those practices as the basis of Dharma.

Again, the good men are those who inhabit the country of Aryavarta. The Vedic passages referring to the disappearance of the Saraswati river would give an indication to the limits of Aryavarta. Again, it is not that all acts of good men are taken as the basis of Dharma, but only such acts believed by them to be good and in accordance with the direct teaching of the Vedas that are taken as the basis of Dharma. Such actions relating to agriculture, commerce, food etc., which are common to people of Aryavarta and to people outside it would not come within the scope of the सदाचार of the Dharma Śastras. But such acts as worshipping of the gods found among men of Aryavarta and among those outside it would be classified as Dharma.

The fact that inner satisfaction is taken as a source of Dharma cannot militate against the authority of custom. The inner satisfaction referred to by Duṣyanta in Kalidasa's Śakuntalam is not a pattern for the conduct of the Society but is solely individualistic and hence, its recognition is for the individual alone and that too, in cases where Śruti, Smriti and Sadachara do not yield an answer for solution.

The alleged excesses of the ancients are capable of many explanations. Two are most prominent. The excesses in the first place cannot serve as an example or pattern of conduct. Hence, the Mimamsakas defending the basis of customs need not take any further note of them at all. But Kumarila has gone further and offered explanations for the alleged excesses either on the basis that they are not excesses at all or that they were justifiable under the circumstances of the particular case which impelled them. For example, Krisna Dwaipayana's getting a Kshetraja son was strictly in accordance with the law of his days and was in exact meticulous compliance of the strict rules of Niyoga imposed in the Dharma Śastras. Rama was so attached to Sita that he thought her golden image kept by his side was sufficient for him to perform the Aśvamedha. Bhiṣma had sons in an extended sense of the word as Manu has stated that if among uterine brothers even one gets children all the rest become endowed with offspring; and hence considered himself to be sufficiently 'married' for the purpose of performing sacrifices.

Regarding the दुराचार quoted e. g. the Southerners who marry the daughters of their maternal uncle contrary to the rules of the Dharma Śastras, Kumarila is very stern and unbending. He would not admit them to be legally valid according to the Dharma Śastras. Of course, Kumarila is technically correct; for it is the wider policy of recognising the issue of such unions as legitimate children entitled to partition and inheritance that has led to the recognition of the custom as legal for all practical purposes. The strict rules of Kumarila would certainly have one desired effect viz., the दुराचार could not increase itself and would not travel into other lands and become the source of Dharma. It is probably the larger interest of public policy that Apastamba should have in mind when he laid down that certain actions not allowed in one part of the country are quite permissible in another. It is with the strict Mimamsa rule in view and with the effect of the दुराचार trying to spread itself that Gautama and Baudhayana have declared that all practices contrary to the Scriptures are unauthoritative. It is, therefore, no surprise that with the lapse of centuries, the दुराचार origin of the rule is forgotten and later Nibandhakaras like the *Smriti-Chandrika* defend the practice

as legal having even indicatory texts of the Vedas allowing or sanctioning such a custom.

Regarding the narrow boundaries of Aryavarta indicated in the Vedas by the disappearance of the Saraswati river, Kumarila refers to the wider ever-expanding boundary of the place where the black antelope lives. Thus Custom is valid all over Aryavarta or Bharatavarṣa which is आसेतुहिमाचलम् and bounded on both the east and the west by the ocean.

Section 2—Authority of local customs

The authority of usages and customs having been established in a general way, the question is raised regarding the extent of the authority of particular customs—Is the authority local or universal?

There are texts which are found in this wise: The Holaka and the like should be practised by the easterners only. The Ahninaibuka and the like should be practised by the southerners only. The Udvriṣabha-yajna and the rest should be practised by the northerners only.

The argument trying to restrict them to the particular countries where the said customs are found would be in the following manner. The authority of Smriti and Custom is held to depend upon the assumption of corroborative Vedic texts. The very fact that established their authority would also prove that the authority is limited or localised. Hence the Holaka should be practised by the easterners only; the Ahninaibuka should be practised by the southerners only and the Udvriṣabha-yajna should be practised by the northerners only.

The Siddhantin[5] says that customs like those mentioned above should be Dharma for all. Because all injunction has that character. The term विधान (injunction) in the Sutra stands for that by which the enjoining is done i.e., the injunctive word. Hence the only reasonable view to take is that the injunction applies to all persons. Because all that the Vedic authority i.e., the assumed Vedic text could only say is that such and such an act should be be done and there is no authority for restricting its application to any particular person or persons.

As the subject matter is very important from a practical point of view viz., the administration of justice in the law courts, further arguments leading to the conclusion are set forth hereunder.

The question is raised as to why there should not be any restriction through indicative marks. For example, such charac-

5 अपि वा सर्वधर्मस्स्यात् तन्न्यायत्वात् विधानस्य—Jaimini, I. iii. 16. In reality the duty should be universal as all injunction has that universal character.

teristics as dark, large-bodied and red-eyed men follow the Ahninaibuka rites may indicate the restriction.

The answer to this is given in an eminently practical way consonant with the actual observance of the custom: (1) There is no such indicative mark as would include all those who are actually found to follow a particular custom. (2) We find as a matter of fact that all men possessing these marks do not follow that custom. (3) Also persons who do not possess these marks do actually follow it. For these three reasons there can be no restriction.

It is then argued that the name itself as 'Southerner' etc. would denote the narrow circle among whom alone the custom is prevalent. For example, 'the Raja shall perform the Rajasuya' would imply that the kings alone should perform the sacrifice; the name Raja could apply to the Kṣatriya only.

The answer of the Siddhantin is that the names are due to some kind of connection with a particular country. For example, the term 'Southerner' should apply to the person connected with i.e., living in the southern country. But as a matter of fact we find that even a man who has gone out of the country and whose connection with that country has ceased to exist is also called a southerner. The name is due to his connection with the country i. e., the past though not in the present. Taking a standard illustration of मायुर the name is appiled

(1) to one who has started for Mathura—his connectoin thuṣ being in the future,
(2) to one who is residing in Mathura—his connection being only in the present,
(3) to one who has migrated from Mathura—his connection being in the past. It is ony when a man has none of these connections with Mathura. that he is not called 'Mathura.' From this it is clear that there can be no restriction based upon name.

Then it is argued that a man migrating from one country, for example, the north and taking his residence in the Southern country in the present would be strictly a Southerner and here at least a restrictive indication can be found.

The answer to this lies in the fundamental law relating to migration: अन्यदेशश्च देशान्तरगतो न नियोगतः परपदार्थान् करोति.[6]

In fact, when a man migrates from one country to another he does not necessarily follow the customs of the latter. So we would find a person living in the Southern country in the present following the custom of another part of the country from which he migrated.

The question is again raised as to why the description of the

6 Ṣabaṛa Bhaṣya on Jaimini Sutra, I. iii. 19.

country where the people live would not suffice. For instance, the country where 'the soil is mostly black' is one where Ahninaibuka is performed. The answer is that it has been shown above that such indicative qualifications as "dark-skinned", "red-eyed", and the like, as belonging to the performer are indefinite and any adjudication by the description of the country would be equally indefinite. Because, as a matter of fact, even in the country where the soil is dark, there are many people who do not perform the act of Ahninaibuka and conversely men residing in a country with other characteristics than the dark soil do perform it. Thus there could be no restriction through the description of the country.

The conclusion is thus firmly established that the Vedic injunction assumed in support of these customs cannot be qualified by any specifications of time and place; firstly, because the specifications generally spoken of are in such terms as among Easterners, as among Southerners and so forth and these terms are purely relative; so that what is 'eastern' for one may be 'western' for another; and secondly, customs in question are not found to be observed by all men of any limited area; nor are they found not to be observed.

Mm Dr. Sir Ganganatha Jha[7] states that the *Brihati* of Prabhakara agrees with the above conclusion. "There being no fixity attaching to any specification no limitation is possible. That there is no fixity is proved by the fact (1) that the Injunction assumed in the Veda cannot impose any such restriction, as all that an injunction can do is to lay down that a certain act *should be done* and (2) that the names of the customs 'Holaka' and the rest cannot indicate any such restriction, as all that they indicate is a certain *act* and (3) that there is nothing else that could specify any place or time."

The juristic reasons given in the Holaka-Adhikarana for arriving at a conclusion that a custom is authoritative *per se* because of its being a custom and that the qualifications like the name of the country or the description of the country where the custom exists and the qualifications like the description of the people who are supposed to observe the custom are of no consequence in determining the validity of the custom have specially to be noted. The eminently practical nature of the Mimamsakas is found in this keen observation of facts that a custom is not actually confined to a particular place or to a specified class. In days when there were no definite data available for knowing whom all the authors of the Dharma Śastras meant by terms like the easterners etc., the Mimamsakas have cut the Gordian knot by

7 *Purva Mimamsa in its sources*, Pages 242-243.

ignoring such terms. The universal authority of customs is emphasised by the Mimamsakas as a corollary to their creed as to the universal authority of the Veda. By this corollary the Mimamsa conferred the greatest benefit on Hindu Jurisprudence.

Reference to the migration of the Hindu from one place to another is made by Śabara and he states that when one migrates from one country to another he does not necessarily follow the customs of the latter. This is exactly the Hindu law as it is administered in our courts today.[8]

In the present day administration of Hindu Law and in the history of custom in several other countries we have a reference to local customs. The local customs are confined to a particular locality. The family customs are confined to particular people. These two kinds of customs come for adjudication before courts; and generally evidence would have to be let in about the existence of the custom in the locality and the family; and if the custom is found to exist, the matter is decided accordingly.

How is it that we find a strange phenomenon in the Mimamsa treatment of the Holaka Adhikarana—the Mimamsakas denying the importance of the local character of the custom when it is described to exist among people called easterners, southerners or when it is described to exist in a locality the soil of which is black or among people who are described as black ?

An examination of the conditions of the validity of custom in modern law and in Mimamsa discloses the answer. In modern law any custom is considered valid. Hence, its existence in a locality or in a family is allowed to be proved. But to the Mimamsakas the fundamental basis of custom is that the custom should not contradict the Smriti and if it does so, the custom is void and is set aside under the rule that it interferes with the Smriti.[9]

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8 Mayne—*Hindu Law*, 11th Ed., Para 57, Page 97.
Mulla *Hindu Law*, 10th Ed., 1946, Section 14 (2)
"Where a Hindu family migrates from one province to another, the presumption is that it carries with it its personal law, that is, the laws and customs as to succession and family relations prevailing in the province from which it came. But this presumption may be rebutted by showing that the family has adopted the law and usages of the province to which it has migrated."

9 Kumarila deals with this question specifically in one of his interpretations on Sutras 8 and 9, Pada iii, Adhyaya I. "Smriti is more authoritative than usage because it is based directly upon the Veda; it leads directly to the inference of its corroborative text; while in the case of usage, the first necessary inference is that of

This rule has therefore another basic principle underlying it. The sphere of custom is beyond the sphere of Smritis. Custom begins its operation where Smritis do not speak.

Therefore, the Mimamsaka as a jurist *par excellence* had to decide the question: "Does this custom satisfy the Mimamsa Rule of not infringing the Smriti injunction?" If it did not, then the custom is valid.

Under these circumstance, the decision as to the validity of the custom is given.

The Mimamsa Jurist after giving his decision on the above basis asks: Why go into any other question as to whether the custom exists in a particular locality or is confined to a particular people? The examination of these two questions does not enter into the decision of the validity of the custom. Hence, the jurist carefully negatived these two elements even when they found a place in books dealing with the subject. This is the advantage from the side of scientific reasoning in arriving at a conclusion.

Another advantage was also obtained. It has been shown that the custom cannot contradict the Smriti rules and hence the sphere of custom is different and beyond the sphere of Smriti rules. Hence when such a custom springs up and is valid, why should not such a custom be prevalent among all people and throughout the country? The custom is good and is found to exist among the Śiṣtas of a particular locality. It is to the welfare of Hindu Society as a whole that such a custom should spread among all the people and throughout the country. Hence the Mimamsakas looked only to the Vidhi—the mandatory nature of the custom and held it enforceable among all people and throughout the country. Thus the growth of a uniform system of सदाचार was fostered by the principle of the Holaka Adhikarana. This is the positive advantage derived.

That these are the underlying principles and distinct advantages would be made more clear when we see Kumarila applying the principle of the Holaka Adhikarana to Smritis which had apparently a local currency. On the juristic basis of the Holaka

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the corroborative Smriti and it is in support of this inferred Smriti text that the corroborative Vedic text is inferred; so that the support of the Veda for usage is one step further removed than in support of the Smriti itself. Then again, the Smriti has been compiled by persons well known as steeped in Vedic lore which fact lends strength to that work. In the case of usage, on the other hand, its exact source is always indefinite and unascertainable which fact weakens its authority."—Ganganatha Jha—*Purva Mimamsa in its sources*, pages 235-236.

Adhikarana the mandates of the Smritis were held to have universal validity. This is the third advantage of the Holaka Adhikarana when custom influenced the jurisdictional nature of Smritis.

From the above detailed examination it would be clear that Mayne's remark that "several rules appear special and peculiar to the Mimamsa system e.g., the Holaka maxim,[10]" though apparently true, could not be strictly accurate.

There seems to be no justification for the further remark that "while the writers on Mimamsa do not recognise local or tribal customs in respect of religious matters, local or tribal customs of a secular nature fall according to them outside the scope of positive injunctions of universal applications."[11] The instances of custom given by Śabara and Kumarila do not warrant this distinction.

But for the genius of the Mimamsaka jurist, the establishment of a reasonable measure of uniformity of law throughout the land would have been an impossibility.

"If the pre-existing customary laws had continued to be recognised only on the basis of custom a bewildering variety of customary laws in different parts of the country would have been the result. The former state of the law in Germany and the present state of the customary law in the Punjab must serve as a warning. In England the operation of a centralised system of Royal justice helped in due course to supersede the customary law of each country which had theretofore been administered by the County and Hundred courts. In India there was no such centralised system of administration in ancient times. When law became part of religion, the same law was followed by all who professed that religion. Later variations were only in matters of detail and arose out of divergent interpretation of texts admitted to be authoritative everywhere."[12]

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10 *Hindu Law* 10th Ed, 1938, Para 20. 11th Ed, 1950, page 36.

11 *Hindu Law* 10th Ed, 1938, Para 34. 11th Ed, 1950, page 61.

12 Sir S. Varadachariar, *The Hindu Judicial System*, 1946, Lucknow. Radha Kumud Mookerjee Endowment Lectures, 1945, page, 38.

Compare *A short history of the British Commonwealth* by Ramsay Muir Vol. I, 1947.

"Henry II started the practice of sending trusted officials of his court regularly on circuit to all the shire courts of the county where they not only inspected the sheriffs but took the trial of the most important cases into their own hands. One result of this practice deserves to be noted. Until this time the law administered in the shire courts had been largely local customs

Section 3—Conflict between Smriti and Sadachara

As an instance of the conflict between Smriti and Sadachara the Mimamsakas take a very practical instance viz., the custom among the Southerners of marrying the daughters of one's maternal uncle.

(1) The arguments in favour of this transgression of the Dharma Śastras, as they were evidently advanced at the time, have been put forth by Kumarila. They asserted that the Smriti and the practices of good men are both independent of each other. They are both equally based on the Vedas as their ultimate source. Hence when we find that they are conflicting, the only way of reconciling them is to treat the two cases supported by the Smriti and Sadachara respectively as alternatives i.e., that both are equally authoritative and that an option would result according to the Mimamsa Rules of Interpretation.

But this explanation is not accepted by Kumarila. He states that the conclusion definitely arrived at is that the Smriti is of greater authority than the practices of good men. This line of reasoning is elaborated in the *Tantra Vartika*. The summary of this argument is taken from Ganganatha Jha.[12] (a)

The *prima facie* view is that inasmuch as both have their basis in the Veda, the contest between them is equal. Just as the authority of the Smriti rests upon the fact of its being based upon the Veda, so too does that of Usage; hence there can be no difference between the two in point of authority. We may even go further and assert that Usage is more authoritative than Smriti; because in its effects, in the shape of action are more easily perceptible.

The established conclusion is as follows:

Smriti is more authoritative than Usage, because it is based directly upon the Veda; it leads directly to the inference of its corroborative Vedic texts; while in the case of Usage, the first necessary inference is that of the corroborative Smriti; and it is in support of this inferred Smriti text that the corroborative Vedic text is inferred; so that the support of the Veda for usage is one step further removed than that in support of the Smriti itself. Then again the Smriti has been compiled by persons well known

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which varied a good deal from one district to another. Now administered by trained lawyers, it began to be uniform; and the *Common Law* of England came into existence. It was not a written body of laws. It was based on ancient customs. But its growth and form were mainly due to the successive decisions of trained judges who started in the reign of Henry II." Page 58.

12(a) *Purva Mimamsa in its sources*, pages 235-236.
Tantra Vartika translation, pages 208-212.

and steeped in the Vedic lore, which fact lends strength to their work. In the case of Usage, on the other hand, its exact source is always indefinite and unascertainable; which fact weakens its authority."

(2) Again the protagonist of Usage argues that the laws are laid down with reference to certain parts of the country. Apastamba has distinctly pointed out that certain actions are not allowed in one part of the country and that they are quite permissible in another."[13]

The śloka of Manu[14] also is sought to be used in support: "The path by which one's father and forefathers have gone on, by that path the good should proceed; so by that procedure alone does he not become attached to sin."

The Siddhantin states that the above is not correct reasoning. Gautama has definitely declared that all practices contrary to the Scriptures are unauthoritative.[15]

A contention is raised here that the expression आम्नाय would denote only the Vedas and that as such Gautama's dictum is no authority. But it is shown that आम्नाय would embrace the Smriti also and the authority of Śankha-Likhita using the expression in a wider sense is quoted[16]. This authority clearly shows that the works of Manu and others were composed on their remembrance of the Vedic texts. Hence, the customs contrary to Manu and other Smritis cannot be authoritative.[17]

As for the declaration of Apastamba, Kumarila states that the same has been completely refuted by Baudhayana who has cited for refutation many instances of customs contrary to the Smritis[18]. Baudhayana refers specially to the custom of the

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13 एतेन देशकुलधर्मा व्याख्याता:— Apastamba. II. 6. 15. 1.

"एतेन देशधर्माः कुलधर्माश्च व्याख्याताः। शास्त्रविप्रतिषिद्धाः मातुलसुतापरिणयादयः अप्रमाणं विपरीताः प्रमाणम् इति" Haradatta's commentary on Apastamba.

14 येनास्य पितरो याता येन याताः पितामहाः।
तेन यायात् सतां मार्गम् तेन गच्छन् न दुष्यति ॥

15 देशजातिकुलधर्माश्च आम्नायैः अविरुद्धाः प्रमांणम् । Gautama XI. 20

The laws of countries, castes and families which are not opposed to the sacred records are also authority.

आम्नायैः :—वेदादिभिः। The sacred records—the Vedas and the rest—Haradatta's commentary on Gautama.

16 स्मार्तधर्माधिकारे हि शङ्खलिखिताभ्याम् उक्तम् आम्मायः स्मृतिधारक इति— Kumarila's Vartika.

17 ततश्च मन्वादिवाक्यप्रतिषिद्धाचाराणाम् प्रामाण्यम् अशक्यम् अभ्युपगन्तुम्। Kumarila's Vartika.

18 आपस्तम्बवचनं तु बौधायनेन स्मृतिविरुद्धदुष्टाचारोदाहरणानि एव प्रयच्छता निराकृतम्। Kumarila's Vartika, Baudhayana I. 2.

southerner marrying the daughter of a maternal uncle or paternal aunt. Then the argument is set forth that he who follows these practices in any other country than where they prevail commits sin and that for each of these customs the rule of the country should be considered as authority. Finally, following Gautama Baudhayana lays down his conclusion that one should not take heed of either set of practices of the Southerners or the Northerners because they are opposed to the tradition of the Śiṣtas. Kumarila follows the authority of Gautama and Baudhayana.

Kumarila concludes this discussion by further stating an additional reason: as we find all such practices originating from visible causes, such as passion and the like, we can never accept the fact of their being a Vedic basis either for such unlawful practices or for the above quoted declarations of Apastamba.[19]

We find that the doctrine of Kumarila is not followed in modern courts of law. "Fullest effect is given to custom both by courts and by legislation. The Judicial Committee in the Ramnad Case said 'Under the Hindu system of law clear proof of usage would outweigh the written text of law.' And all the Acts which provide for the administration of law dictate a similar adherence to usage unless it is contrary to justice, equity or good conscience or has been actually declared to be void."[20]

The duty of a judge therefore is, as pointed out by the Judicial Committee in the above case, not so much as to enquire whether a disputed docrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular school which governs the district with which he has to deal and has there been sanctioned by usage.

The reason for this has been laid down by them in a later case. "The commentators while professing to interpret the law as laid down in the Smritis introduced changes in order to bring it into harmony with the usage followed by the people governed by the law; and that it is the opinion of the commentators which prevails in the provinces where their authority is recognised. In the event of a conflict between the text writers

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पञ्चधा विप्रतिपत्ति : दक्षिणात : तथोत्तरत : । 1.
उभयं चैव नाद्रियेत शिष्टस्मृतिविरोधदर्शनात् । 8.

There is a dispute regarding five practices both in the south and in the north. And one should not take heed of either set of practices because they are opposed to the tradition of the Śiṣtas.

19 स्पष्टकामादिहेत्वन्तरदर्शनात् न विरुद्धाचाराणाम् आपस्तम्बवचनस्य वा श्रुतिमूलत्वोपपत्तिः । Kumarila's Vartika.

20 Mayne's Hindu Law, Para 35, 11th Edition p. 62.

and the commentators the opinion of the latter must be accepted."[21]

The commentaries modified and supplemented the rules in the Smritis, in part by their own reasoning and in part in the light of usages that had grown up. They did their work so well that the Commentaries and Digests have in effect superseded the Smritis in a very large measure.

We are now in a position to compare the Mimamsa Rule of Interpretation and the rules of law adopted by modern courts in the administration of Hindu Law.

The Mimamsa Rule of Interpretation may be compared to the English rule where a custom must not be contrary to an Act of Parliament. In a broad sense we may compare the Smriti to an Act of Parliament. In the words of Coke, "no custom or prescription can take away the force of an Act of Parliament." By no length of desuetude can a statute become obsolete or inoperative in law and by no length of contrary usage can its provisions be modified in the smallest particular. The common law will yield to immemorial custom but the enacted law stands for ever.[22].

The rules of law adopted by modern courts in the administration of Hindu Law may be compared to the rule adopted by the Roman law and by the various Continental systems derived from it. There the latter rule prevails over the earlier regardless of their respective origins. Legislation has no inherent superiority in this respect over custom. If the enacted law comes first, it can be repealed or modified by later custom; if the customary law is earlier it can similarly be dealt with by later enacted law. Savigny says: "If we consider customs and statutes with respect to their legal efficacy, we must put them on the same level. Customary law may completely modify or repeal a statute; it may create a new rule and substitute it for the statutory rule which it has abolished."[23]

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21 Atmaram Abhimanji *vs.* Bajirao Janro (1935) 62 Ind. Appeal 139 at p. 143.

22 Salmond Jurisprudence 10th Ed. 1947, page 210.

23 Salmond Jurisprudence 10th Ed. 1947, page 211.

"It must not therefore be supposed that either rule is one of necessity derived by logical inference from the nature of things." Salmond, do. p. 210.

Chapter VI

PARIṢADS

By the time of the Sutras and the Smritis the term Pariṣad began to be referred to the assembly deciding doubtful points of Dharma. In the age of the Upaniṣads the term Pariṣad denoted the circle of philosophical disputants and academies of different localities which were occasionally summoned by a great king in which the thinkers of the various schools were invited to meet and exchange their views on questions of philosophy. In this connection the Upaniṣads themselves have been regarded by historians as the outcome of such academic disputations on philosophy, the transactions so to speak of the philosophical societies or circles of philosophic celebrities of the time.

Gautama at the end of his Dharma Sutra[1] states that in cases for which no rule has been given, that course must be followed of which at least ten Brahmanas who are well instructed, skilled in reasoning and free from covetousness approve. He declares that a Pariṣad shall consist of the ten following members: 4 men who have completely studied the 4 Vedas, 3 men belonging to the 3 orders and 3 men who know the different institutes of law. But on failure of them the decision of one Śrotriya who knows the Veda and is deeply instructed shall be followed in doubtful cases.

Baudhayana in the very beginning of his Dharma Sutra[2] states that on failure of the Śiṣtas an assembly of at least ten members shall decide. The ten are: 4 men each of whom knows one of the 4 Vedas, a Mimamsaka (विकल्पी) one who knows the Angas, one who recites the works on the sacred law (धर्मपाठकः) and three Brahmanas belonging to the three orders. Then he states that there may be five, or there may be three, or there may be one blameless man who decides; and a thousand ignorant men cannot decide it. Many thousands of Brahmanas if they have not fulfilled their sacred duties and are unacquainted with the Veda subsist only by the name of their caste.

Vaśiṣtha[3] practically follows Baudhayana and the Sutra regarding the composition of the ten members of the Pariṣad is identical with that of Baudhayana.[4]

Manu has a separate section dealing with the doubtful

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1 Chapter XVIII, Sutras 48, 49, 50, 51.

2 Baudhayana, I. 1. 1. Sutras 7 to 16.

3 Vaśiṣtha III, 5 to 7 and 20.

4 Vaśiṣtha III. Sutra 20=Baudha I. 1. 1. 8.

points to be decided by the assembly.[5] The expression आम्नातेषु[6] in the text of Manu is very significant and evidently defines the scope of the jurisdiction of the Pariṣad. The jurisdiction of the Pariṣad extends only to points not covered by the Vedas and Smritis; and of course the points of Dharma which are covered by Sadachara would not fall wtihin their scope.

Those Brahmanas who have read the Veda along with the supplements in the right manner and who are guided solely by the revealed texts shall be regarded as the Śiṣtas.[7]

Medhatithi adds that शिष्टा: should look upon the Vedas as free from all defects to the same extent that direct perception is regarded as entirely trustworthy. Or they are those who rely upon the Vedic texts directly found i.e., they look upon those directly perceptible texts as the sole means of ascertaining what is Dharma (right) and what is Adharma (wrong).

The ten members constituting the Pariṣad are: a person learned in the 3 Vedas, a logician, a *Mimamsaka*, a person knowing the *Nirukta*, one who studies the Dharma Śastras and 3 men belonging to the first three life stages.[8]

Though Manu recommends ten members, yet he holds that the minimum number should be at least 3—a person knowing the *Rig Veda*, a person knowing the *Yajur Veda* and a person knowing the *Sama veda* shall be understood to form the assembly of at least 3 members, competent to decide doubtful points of law.[9]

Medhatithi makes a very pertinent observation that the meaning of the Veda is understood with the help of *Nirukta*, Vyakarana and *Mimamsa*. So a knowledge of these must be possessed by all three persons as these three viz., *Nirukta*, Vyakarana and *Mimamsa* do help the comprehending of not only one Veda but of all the Vedas. Hence, a knowledge of these—*Nirukta*, Vyakarana and *Mimamsa* is essential in all cases.

While fixing the number ten or even three, the idea in the mind of the Smritikara is to get the opinion of the best thinkers who will be versed in the Vedic text and they would not care for a large number of unqualified persons.

An important conclusion could be drawn from the very place assigned to the Pariṣad in the Dharma Śastra of Manu. We could

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5 Manu, Adhyaya XII Section 12 Ślokas 107 to 116.

6 अनाम्नातेषु धर्मेषु कथम् स्यादिति चेद्भवेत् ।
यं शिष्टा ब्राह्मणा ब्रूयु : स धर्मास्स्यादशङ्कित: ।। Manu XII, 108.

7 धर्मेणाधिगतो यैस्तु वेद: स परिब्रह्मण : ।
ते शिष्टब्राह्मणा ज्ञेया श्रुतिप्रत्यक्षहेतव: ।।

8. त्रैविद्यौ हेतुकस्तर्को नैरुक्तो धर्मपाठक: ।।
त्रयश्चाश्रमिण: पूर्वे परिषद् स्यात् दशावरा: । Manu XII Śloka III.

9. Manu XII. 112

divide the whole teaching of Dharma according to Manu into two halves :—

A. Adhyaya I up to Adhyaya XII, Śloka 106.

B. Adhyaya XII, Ślokas 107 to 116.

The first deals with Dharma as laid down in the Dharma Sutras. It deals with the three sources of Dharma—Śruti, Smriti and Sadachara. It deals with the acts of Dharma like the Agnihotra enjoined in the Veda, the Aṣṭaka Śraddha laid down in the Smriti and the Holaka festival practised by the Śiṣtas . The acts of Dharma mentioned here are actually practised and are a matter of certainty.

When we now look to the second half dealing with the Pariṣad the differences become clear.

(1) We may note that the Dharma portion of the first half is भूत while the Dharma of the second half is भव्य—yet to assume a shape in the decision of the Pariṣad. The particular persons to whom the Pariṣad would lay down the Dharma have yet to obey it.

(2) The field of Dharma and the scope of Dharma of the first half are the texts of the Dharma Śastras in their entirety. But the jurisdiction of the second half begins where the jurisdiction of the first half ends i.e., in respect of only those portions not mentioned in the first half. There can be no clash or conflict of jurisdiction of laws.

(3) From this follows another important distinction: the first half deals *comprehensively* with all aspects while the second half could only deal spasmodically with Dharma not mentioned in the first half as stated in Manu's phrase अनाम्नातेषु. And hence it would appear that the second half could generally cover for example points in Prayaścitta not actually mentioned in the Prayaścitta portion of the Smritis.

From the above description of a Pariṣad we can draw another essential feature by which the decisions of a Pariṣad may in rare cases become the शिष्टाचार of the land.[10] For example when a particular Prayaścitta is enjoined by the Pariṣad on a particular person and where afterwards all the Śiṣtas follow the same in every such instance arising for their action, the decision of the Pariṣad may become so stereotyped that it may be well called सदाचार. Even then there is no conflict of law

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10 We should remember the necessary distinctions drawn by Gray in "Nature and Sources of Law" 2nd Edition, 1924, Chapter on Custom pp. 282 to 301 & 285. "*Custom is not opinion*, it is *practice*. The opinion of a community as to what a man ought to do is not based on custom unless there is *a general practice*. Customary opinion is an incorrect expression."

or conflict of jurisdiction; for, the particular decision of the Pariṣad has now in reality become the सदाचार of the land and at the stage of its being the सदाचार it has no connection with its original parent viz., the decision of the Pariṣad. The decision as now adopted and practised by all the Śiṣtas is rightly called सदाचार and could claim its seat in the upper house alone viz., in the region where the Dharmic Acts of the Śruti, Smriti and Sadachara are exercising jurisdiction.

The easy passage from a decision of the Pariṣad to the सदाचार of the Śiṣtas is again made easy by the very nature of the common aspect of their jurisdictions. Both have jurisdictions where Śruti and Smriti do not make their voices heard.

This is the jurisprudential aspect of the nature and constitution of a Pariṣad.

Though the texts permit in extreme cases a single man to declare Dharma in cases of doubt, they give emphatic warning that this should not be done as far as possible. Baudhayana states that the way of Dharma is very subtle and difficult to follow. It has many entrances (i.e., it appears different under different circumstances). Therefore, a person though knowing much should not undertake single-handed to propound the proper course of conduct in cases of doubt.[11]

Rama when he addresses Vali on the reasons for killing him began by stating the same thing—

अपृष्ट्वा बुद्धिसंपन्नान् वृद्धान् आचारसंमतान्[12].

Rama evidently insisted upon a proper course of apprenticeship under competent gurus for every expounder of Dharma.

Radha Kumud Mookerjee in his *Ancient Indian Education—Brahminical and Buddhistic*, notices certain special features of the constitution of the Pariṣad.

The composition and constitution of the Pariṣad was quite in keeping with the gravity of the functions and responsibilities entrusted to it. Because it had to direct the life of the community and it was at once the most representative and authoritative body that the community could think of, the highest talent and character in the community were represented on its committee.

There was in the first place an adequate representation of Vedic learning which was the fountain of all law. By this feature the Pariṣad is easily distinguished from the ordinary domestic school of the period presided by an Acharya who was normally an expert in only one of the Vedas.

Secondly, there were, in the words of Manu, those who

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11 बहुद्वारस्य धर्मस्य सूक्ष्मा दुरनुगा गतिः ।
तस्मान्न वाच्यो हि एकेन बहुज्ञेनापि संशये ॥—Baudhayana.

12 Valmiki Ramayana, IV, 18. 5.

could explore the Śruti and Smriti by modes of reasoning not repugnant to the Vedic lore.[13] The modes of reasoning according to Medhatithi and Kulluka are the Mimamsa of Jaimini to be distingushed from the philosophical schools like the Bauddhas Nigranthas and Laukaytikas who deny the authority of the Vedic texts.

Thirdly, there were those who were experts in what may be called the secular law—the Dharma and Grihya Sutras of which the different schools were represented on the Pariṣad whereas the ordinary school of an Acharya was connected with one particular school of Sutras determined by the particular Śakha to which the Acharya belonged.

Fourthly, the Pariṣad represented the particular wisdom and the experience belonging to each of the 3 orders or Aśramas viz., the Student, the Householder, Vanaprastha or ascetic but not the hermit who had no concern for secular matters at all and who would not pass ordinarily through human habitations. The representation of the student community in such an authoritative body shows a degree of recognition of their special interests and status which is not allowed even in modern educational organizations professing advanced democratic ideals.

Thus the Pariṣad was an academic institution of a composite or federal type on which were represented the different faculties or departments of learning of the times together with the different classes of experience and interests in society. Thus constituted and composed it was competent to discharge its high and resposnible functions sometimes as a judicial assembly and sometimes like an ecclesiastical synod. It was also an association of teachers and students and other learned men and would thus form the nucleus of something corresponding to a university.

The composition of the Pariṣad is also interesting from another point of viw. It shows the progress of specialisation in Vedic study achieved during this period. According to Gautama there were four specialists in the four Vedas of the walking library type. Next were three others who specialised in the three different institutes of law besides another three who were proficient in the laws relating to the three Aśramas of life. Vaśiṣtha and Baudhayana refer however, to specialists in Mimamsa, in the Angas and in the sacred law. Manu wants three specialists in the three Vedas and specialists in logic, *Mimamsa*, *Nirukta* and Law. It will be noticed that all these references point to the early development of law schools. Vaśiṣtha and Baudhayana mention

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13 आर्षं धर्मोपदेशं च वेदशास्त्राविरोधिना ।
यस्तर्केणानुसंधत्ते स धर्मं वेद नेतरः । Manu XII. 106.

side by side with one who knows the Angas, the reciter or teacher of the sacred law (धर्मपाठक:) who must therefore be a person who specially devotes himself to the study of that subject and knows more than one Dharma Sutra. He is, so to speak, the Law member of the Pariṣad; and to speak of *one* legal expert means that special Law schools were already existing, the collective literature of which had to be mastered by that expert. Gautama, however, constitutes his Pariṣad rather differently; he does not create a special seat for an individual Law member. He requires three persons knowing three different Dharma Sutras and says nothing of any experts specially devoted to the study of the sacred law. Manu's Pariṣad, however, knows of an individual Law member like that of Vaśiṣtha and Baudhayana.

Section 2—Who are the Śiṣtas

We have seen in the chapter on Custom that the सदाचार is the आचार of the Śiṣtas. In the chapter on Pariṣad we have also the references to the various qualifications of the members forming the Pariṣad and they according to Baudhayana are the select Śiṣtas chosen for the Pariṣad in the absence of the whole body. So it is necessary to consider the meaning of this term in Mimamsa and Dharma Śaṣtras.

The Baudhayana Dharma Sutra says "Śiṣtas are those who are free from envy and pride, who keep only as much corn as is measured by the Kumbhi, who are free from greed and hypocrisy, arrogance, covetousness, delusions and anger. Those are Śiṣtas who have studied the Veda according to the prescribed method, together with its appendages (viz., Itihasas and Puranas), who know how to draw inferences from that and who tend to make people realise the teaching of the Veda."[14]

The *Maha-Bhaṣya* of Patanjali has a very illuminating passage on the qualifications of a शिष्ट. "The country which is east of आदर्श, west of Kalikavana, south of the Himalayas and north of Pariyatra is Aryavarta. Those Brahmanas who live in this country of the Aryas, who do not store up riches (but who keep only as much grain as is contained in a jar), who are not greedy, who do good disinterestedly and who without any effort are conversant with a certain branch of knowledge are the worshipful Śiṣtas."[15]

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14 शिष्टा: खलु विगतमत्सरा: निरहंकारा: कुम्भीधान्या अलोलुपा: दम्भदर्पलोभ-मोहक्रोधविवर्जिता: ।

धर्मेणाधिगतो येषां वेद स परिबृंहण: ।
शिष्टास्तदनुमानज्ञा: श्रुतिप्रत्यक्षहेतव: ।।

Baudhayana *Dharma Sutra* I. 1. 5. 6. The 2nd portion of Baudhayana's text is Manu's XII. 109 with slight variations.

15 क: पुन: आर्यावर्त: ?
प्रागादर्शात् प्रत्यक्कालिकवनात् दक्षिणेन हिमवन्तम् उत्तरेण पारियात्रम् । एतस्मिन्

Śabara in his *Bhaṣya* evidently follows the definition of Patanjali. In the Jaimini's Sutras[16] the question is discussed whether a word should be taken in the sense attributed in the scriptures. The Purvapakṣa view is that when one and the same word in used in different senses, there arises a doubt as to which is most authoritative. The Śiddhantin's answer is[17]: "In reality that which is based on the scriptures is to be taken as more authoritative because the scriptures are the basis of that authority. Or that sense in which the word is used by persons who take their stand upon the scriptures is to be accepted as more authoritative because it is more reliable than any other." To this Śabara adds:[18] "What then is the factor that determines which is the right signification of the term. That signification is the right one which is accepted by persons who rely upon the scriptures. Who are the persons who rely upon the scriptures? Those who are the cultured and learned; because such persons are conversant with the unbroken tradition bearing upon words and the Vedas. That is the reason why cultured men are the basis—means for ascertaining the sense of the Vedic and Smriti texts."

But Śabara would not evidently confine the Śiṣtas in the narrow compass of Aryavarta as defined by Patanjali. Śabara in more than one place defines Arya.arta as referring to the whole of India from the Himalayas to Cape Kanya Kumari. In the Sutras of Jaimini the question is ask d by the Purvapakṣin as to why this doubt about usage should rise at all. The Siddhantin's answer is: The doubt arises because it points both ways; among people in the whole country—from the Himalaya down to the Kumari (Cape Comorin) the term 'parva' (from which पार्वण is derived) is known as denoting a point of time as also a group.[19]

आर्यनिवासे ये ब्राह्मणा: कुम्भीधान्या: अलोलुपा: अगृह्यमानकारणा: किञ्चिद् अन्तरेण कस्यचिद् विद्याया: पारगा: तत्रभवन्त: शिष्टा: Patanjali—*Maha-Bhaṣya* on *Panini* VI. 3. 109, पृषोदरादीनि यथोपदिष्टम् ।

16 I. iii. 8-9.

17 शास्त्रस्था वा तन्निमित्तत्वात् । Jaimini Sutras I. iii. 9.

शास्त्रस्था—That which is sanctioned by the scriptures or accepted by men learned in the scriptures (is more authoritative) तन्निमित्तत्वात्-because that is the sole source of authority.

18 क: पुन: अत्र निश्चय: । य: शास्त्रस्थानां स शब्दार्थ: । के शास्त्रस्था: । शिष्टा: । तेषाम् एव अविच्छिन्ना स्मृति: शब्देषु वेदेषु च । तेन शिष्टा: निमित्तम् श्रुतिस्मृत्यवधारणे । *Śabara Bhaṣya* on I. iii. 9.

19 उभयत्र प्रसिद्धे: । उभयत्र हि पर्वशब्दो लोके प्रसिद्ध: काले समुदाये च आ हिमवत: आ च कुमारीभ्य: । *Śabara Bhaṣya* on IX. ii. 51.

Though the word लोक is used here the usage i.e. the practice of the sacrifices mentioned in the scriptures could only arise among those who actually offer the sacrifices; and they are the शास्त्रस्था:

In another Adhikarana[20] the meaning of the word चरु is discussed whether it means a pot or cooked rice. The Purvapakṣin refers to the use of the word as a pot. "The term चरु is generally known from the Himalayas to Cape Comorin as standing for a pot. As a matter of fact all over the country the word चरु is found to be used in the sense of a pot. The most reasonable course is to accept what is well recognised.[21] The Siddhantin's answer[22] is that it is more reasonable to take the word as cooked rice. All cultured people offer sacrifices to deities with substances that can be eaten and not with substances that cannot be eaten. From the practice of these cultured people we infer the Smriti and from the Smriti the basis of the Vedic text. The Siddhantin further adds that the term चरु is recognised as denoting cooked rice from the Himalayas down to Cape Comorin.

Mm. Kane[23] concludes "Śabara (nor later than 5th century A.D.) in his *Bhaṣya* shows that to him there was unity of language and culture from the Himalayas to Cape Comorin."

The eastern and western oceans had always remained as the eastern and western boundaries of Aryavarta ever since the days of Manu.[24] Thus the Śruti, Smriti and Sadachara of Śiṣtas extended all over India.

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20 Jamini X. i. 34 to 44.

21 प्रसिद्धश्च स्थाल्यां चरुशब्दः । आ च हिमवतः आ च कुमारीभ्यः । प्रसिद्धस्य ग्रहणं न्याय्यम् । *Śabara Bhaṣya* on X. 1. 35.

22 ओदने च चरुशब्दः आ च हिमवतः आच कुमारीभ्यः । तत्र ओदनीयसंयोगो युक्तो भविष्यति ।*Śabara Bhaṣya* on X. 1. 36.

23 *History of Dharma Ṣaṣtra*, Vol II. Part I.

24 Manu II. 22.

Chapter VII

JUSTICE, EQUITY AND GOOD CONSCIENCE

We have so far dealt with the sources of Hindu Law—Śruti, Smriti, and Sadachara. In case where no definite rule would be found among the recognised sources for the solution of a particular question of discussion the judges decided the question by appealing to "justice equity and good conscience." This phrase has become a term of art. The English judge referred to persuasive precedents as the English and Roman law, text books, *the use of analogy* and such help as may be afforded by custom or the course of business.

The principles of justice, equity and good conscience are made applicable by the several Civil Courts Acts in the absence of any express provision of Hindu Law. This is certainly an additional source of Hindu Law.

"Justice, equity and good conscience" have been generally understood to mean the rules of English law modified to suit Indian conditions. But they may equally well be rules or analogies deduced from general principles of Hindu Law altered if necessary to suit the conditions of modern society.

Regarding the scope of the application of analogy to cases where there is no authority, a modern authority[1] says:

"The advantages of a proper use o analogy is that it enables the new situation to be dealt with by a .ule which can be placed in a coherent relation with rules that are already established. It is thus assumed that the law is a consistent body of principles and every attempt is made to keep it such."

In the light of the general principles we shall examine the cases where English law has been applied.

(1) In I. L. R. 11 Bombay 551=14 I. A. 89 the guardian covenanted for herself and her infant ward to indemnify the purchaser of the ward's estate against any claim by the Government for revenue and it was held that it was beyond the power of the guardian to impose a personal liability on the ward. Lord Hobhouse delivering the judgment of the Board stated: "Now it was most candidly stated by Mr. Mayne who argued the case on behalf of the Respondent that there is not in Indian Law (Hindu Law) any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English Law. In point of fact the matter must be decided by

1 G. W. Paton. A Text book of Jurisprudence 1948, page, 167.

equity and good conscience generally interpreted to mean the rules of English Law if found applicable to Indian society and circumstances. Their Lordships are not aware of any law in which the guardian has such a power nor do they see why it should be so in India. They conceive that it would be a very improper thing to allow the guardian to make covenants in the name of his ward so as to impose a personal liability upon the ward and they hold that in this case the guardian exceeded her powers so far as she purported to bind her ward and that so far as this suit is founded on the personal liability of the Taluqdar it must fail."

(2) In I. L. R. 11 Lahore 251 the meaning of the term "clog on the equity of redemption" was considered. Lord Tomlin delivering the judgment of the Privy Council stated :—

"It is to be observed that the Transfer of Property Act by Section 60 of which the right of a mortgagor to redeem is regulated has no application to the N. W. F. Province. The matter is governed by the N. W. F. P. Law and Justices Regulation. Section 27 of Regulation VII provides in effect that decisions in certain matters which do not include mortgages shall be according to the law of the parties concerned. By Section 28 of the same Regulation it is provided that in cases not otherwise specially provided for, the judges shall decide according to justice, equity and good conscience.

"In 14 I. A. 89(96) Lord Hobhouse pointed out that a direction to decide by equity and good conscience was generally interpreted to mean the rules of English Law if found applicable to Indian society and circumstances. The terms of Section 60 of the T. P. Act are an indication that the rules of English law relating to a mortgagor's right to redeem are applicable to Indian society and circumstances. There is no indication to the contrary. The matter must therefore be governed by the rules of English law."

(3) In I. L. R. 7 Lucknow 257 the suit related to a contract among Shiahs by which one party was made owner but it was also agreed that she should not have the power to transfer to a stranger and that the ownership should devolve as family property. The alienation was made to persons outside the family. It was contended that the alienations were valid because the contract constituted her as absolute owner and the restrictions were void as repugnant thereto.

Sir George Lowndes in delivering the judgment of the Board stated :—

"The law by which this question must be judged is, their Lordships remark, prescribed by Section 3 of the Oudh Laws Act of 1876 failing the earlier clauses of the Section which seem to have no application; 'the courts shall act according to justice equity and

good conscience' which has been adopted as the ultimate test for all provincial courts in India."

"It was pointed out by Lord Hobhouse in 14 I. A. 89 (96) that the expression 'justice, equity and good conscience' was generally interpreted as meaning English Law if found applicable to Indian society and circumstances. If this is to be the test, there is authority that in English law a partial restriction would not be regarded as repugnant in the case of a testamentary gift. So in L. R. 20 Eq. 186 Sir George Jessel M.R. upheld a condition attached to a devise in fee that the devisee should never sell out of the family pointing out this had been the law from the time of Coke and in 1805, 6 East 173 Lord Ellenborough affirmed the validity of a similar transaction."

(4) In 51 I.A. 368=I.L.R. 48 Bombay 569 the question arose relating to a point of Hindu Law. The next reversioner murdered the mother of the intestate upon whose death the reversionary interest was expected to open. Lord Phillimore in delivering the judgment of the Board stated:—

The case raises three questions. (1) Can the murderer succeed? (2) If not, can title be claimed through him? and (3) if not and he is to be wiped out altogether, who are the heirs of Parappa?

"As to the first two questions, the Subjudge held that the matter was provided by Hindu Law and that this law disqualified a murderer from succeeding to the estate, the succession to which he had accelerated by killing the woman who had a previous interest during her life. But in compliance as he considered with a decision of the High Court of Madras, he held that nervertheless the murderer did take the legal estate though he was disqualified from having any beneficial interest. He further held that this disqualification was not confined to a personal disqualification but wiped him out from the line of descent, so that the heirship to the propositus Parappa is to be traced directly and through him.

"The High Court (Judgment reported in I. L. R. 45 Bomb 768) came to the same conclusion i.e., that the murderer had no title and that the heirship was not to be traced through him but on a somewhat different line of reasoning. The learned judges thought that there was no Hindu Law which governed the matter so that they had to have recourse in obedience to Bombay Reg. IV § 26 to the principles of equity, justice and good conscience. And while thinking it immaterial whether the murderer had the legal estate vested in him or not because in either case he must for the purpose of inheritance be treated as if he were dead when the inheritance opened and not as being a fresh stock of descent, they thought it simpler to say that the exclusion extends to the legal as well as the beneficial estate."

"Before this Board it has been contended that the matter is governed by Hindu Law and that the Hindu Law makes no provision disqualifying a murderer from succeeding to the estate of his victim and therefore it must be taken that according to Hindu Law he can succeed and he being alive, plaintiff has no title.

"Their Lordships do not take this view. There is much to be said for the argument of the Subjudge that the principles of justice which can be traced in Hindu Law would warrant an inference that according to that law a man cannot take advantage of his own wrong and that if the case had come under consideration by the Hindu sages they would have determined it against the murderer. But it is unnecessary so to decide because the alternative is between Hindu Law as above stated or being for this purpose non-existent and in this latter case they have rightly decided that the principles of equity, justice and good conscience excluded the murderer.

"The English law on this subject is based upon principle and well settled. It is true that the reported decisions have been in cases where the murderer was a devisee or legatee under the will of the murdered person and that Joyce J. in 1915, 2 Chancery 173 thought it a matter for consideration whether the same rule would apply in the case of an intestacy and cited a decision of the Court of The United States of America by which it was held that the provisions of the Statute of Distributions were paramount and forbade the consideration of any disqualification. But the actual decision of Joyce J. was rested upon another ground and a quite satisfactory one and their Lordshlps are unable to follow the reasoning of the learned American judge. Statutes regulating heirship or descent or giving force to wills and the devises contained in wills should be read as not intended to affect paramount questions of public policy or depart from well settled principles of jurisprudence.

"In their Lordships' view it was rightly held by the two courts below that the murderer was disqualified and with regard to the question whether he is disqualified wholly or only as to the beneficial interest which the Sub-judge discussed founding upon the distinction between beneficial and legal estates which was made by the High Court of Mardras in I. L. R. 27 Madras 591, their Lordships reject as did the High Court here any such distinction. The theory of legal and equitable estates is no part of Hindu Law and should not be introduced in the discussion."

From the first three Privy Council decisions quoted above, it is clear that they relate to subjects which are not within the application of Hindu Law. One decision related to the powers of the guardian to make a personal covenant on behalf

of the ward. The other confined itself to a question as to clogs on the equity of redemption fettering the right to redeem. The third decision pertained to the construction of a sale-deed among Shiahs restricting the powers of the vendee. In these three the English law was applied as that was taken to be meant by justice, equity and good conscience.

In the fourth case the matter was decided *de hors* Hindu Law. Whether there was a provision in the Hindu Law or whethere there was no provision, paramount public policy dictated the rule to be applied and it was therefore unnecessary to consider the Hindu Law at all.

Hence we may conclude that the Privy Council decisions in applying English law really want to confine the application of that law (1) to cases to which Hindu Law does not apply and (2) to cases to which Hindu Law could not apply.

In all other cases where Hindu Law does and could apply the decision should be governed by Hindu Law alone.

Hence Srinivasa Ayyangar[1] is perfectly justified in stating that "though justice, equity and good conscience have been generally understood to mean the rules of English law modified to Indian conditions there may equally well be rules or analogies deduced from general principles of Hindu Law altered to suit the conditions of modern society."

Justice Chandravarkar of the Bombay High Court states: —

"Hindu Law is a jurisprudence by itself and contains within its limits all the principles necessary for appliction to any given case....The Hindu Law givers have not indeed laid down a rule in express terms on every concievable point. But having provided texts for such cases as had arisen before or in their time, they left others to be determined either with reference to certain general principles laid down by them in clear terms or by the analogy of similar cases governed by express texts."[2]

Hence in matters governed by Hindu Law as marriage and adoption, joint family and partition, alienation, debts, inheritance and Stridhana, gifts and wills, maintenance and religious endowments we need not go to English law even in respect of questions for which no definite answer is laid down in the Dharma Śastra texts. We may well draw the conclusion by the application of the principle of Atideśa (अतिदेश)[3] laid down in the Mimamsa.

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1 Editor of Mayne. *Hindu Law* 10th Ed. 1938 p. 86. This is adopted in the 11th Ed. 1950 p. 71.

2 Kalgavada Tavanappa *vs.* Somappa, 1909, I. L. R. 33 Bombay 669 at p. 680.

3 See the Section on अतिदेश in the part : "Mimamsa Rules of Interpretation."

Not only that the conclusions may be drawn from the analogies of Hindu law but as decided in the Tagore case, the Privy Council deduced the principles from the law of gifts and applied them to the law of wills and stated that "it is the *duty* of the court dealing with a case now in the instance to be governed by the established *principles* and *analogies* which have heretofore prevailed in like cases."

The above conclusion is reinforced by the weighty observations of the Privy Council in two cases.

In 13 M. I. A. 373 at p. 390 Sir Robert Phillimore stated: "The question then is reduced to this whether the Plaintiffs being the great-great-great-grandsons of the common ancestor were too remote in degree to be heritable as gentiles. The subject is important, it is beset with difficulties raised by varying opinions, decisions and comments on a text too clear enough if interpreted by the principle of Hindu law according to the Benaras school which is the most orthodox of the different schools. The governing authority of the school is the Mitakshara. The compiler of the Mitakshara is said to have been an ascetic devotee and from that source nothing at variance with the religion of the Hindus is likely to have flowed. The Hindu law contains within itself the principles of its own exposition. The Digest subordinates in more than one place the language of the text to custom and approved usage. *Nothing from any foreign source* should be introduced into it nor should the courts interpret the text by the application to the language of *strained analogies*."

In Ramachandra *vs.* Vinayak 41 I.A. 290, the Privy Council stated: "It is to be remarked as has been observed in previous cases before this Board that the Hindu law contains its own principles of exposition and that questions arising under it cannot be determined by abstract reasoning or *analogies borrowed from other systems of law* but must depend for their decision on the rules and doctrines enunciated by its own law-givers and recognised expounders."

The weight of the above remarks is so great that we find the English Law not applied as justice, equity and good conscience even in a case of divorce. In I. L. R. 1948 Bomb. 223 Stone C. J. concurred with Chagla J. who stated as follows :—

"We have a Muslim wife according to whose personal law conversion to Islam, if the other spouse does not embrace the same religion, automatically dissolves the marriage. We have a Zorastrian husband according to whose personal law such conversion does not bring about the same result. The Privy Council in 14 I. A. 89 at 96 expressed the opinion that if there was no rule of Indian law which could be applied to a particular case then

it should be decided by equity and good conscience and they interpreted equity and good conscience to mean the rules of English Law which can be made applicable to Indian Society and circumstances. And the same view was upheld by their Lordships of the Privy Council in 59 I. A. 236 at p. 246. But there is no rule of English law which can be made applicable to a suit for divorce by a Muslim wife against a Zorastrian husband. The English law only deals with Christian marriages and with grounds for dissolving a Christian marriage. Therefore *we must decide according to justice and right or equity and good conscience independently of any provision of the English Law.* We must do substantial justice between the parties and in doing so hope that we have vindicated the principles of justice and right or equity or good conscience. The Madras High Court has held in 26 M. L. J. 260 that when a Hindu woman was converted to Islam and during the lifetime of her Hindu husband, married a Mahomedan and had several children by the second marriage, the second marriage was illegal and the children who were born of the union illegitimate. The court held that where a conflict occurs between persons belonging to different religions, it must apply the rules of justice, equity and good conscience. The court further held that in testing whether the first marriage of a Hindu woman with a Hindu husband was subsisting or not at the time of her second marriage with a Muslim after she became a convert to Islam, the principles of Hindu Law should be applied; but in testing the validity of her second marriage, the principles of Muhammadan law should be applied."

The phrase "Justice and right" occurs in the Charters and justice, equity and good conscience appears in the Civil Courts Act. In I. L. R. 55 Madras 727 at p. 746 Cornish J. observed: "Equity and good conscience said their Lordships of the Judicial Committee in 14 I. A. 89 are generally interpreted to mean the rule of English law found applicable to Indian society and circumstances. The words justice and right in the Charters mean the same thing according to the judgment of Peacock C. J. to which reference has already been made. There is no reason why one rule should be applied under the Charters and another rule under the Letters Patent."

Thus all that we urged in respect of the applicability of Hindu Law with respect to justice, equity and good conscience would also apply in cases of justice and right. Thus the recognised sources of Hindu Law remain supreme and unaffected.

Section 2—Illustrative Cases

We shall give hereunder a few cases of the application of the

principle of अतिदेश to cases which are not covered by clear cut defined rules of law governing the decision.

(1) The question arose in the Full Bench Case I. L. R. 41 Mad. 44, whether an illegitimate son of a permanently kept concubine could succeed to his putative father's properties. Kumaraswamy Sastry J. stated : "Even assuming that the order of succession to a sonless Hindu given by Manu and Yajnavalkya and propounded by Vijnaneswara in Chapter II, Section 1 Placitum 2 would not in terms apply owing to the word पिता being confined to the legitimate father and to the want of Sapinda relationship between a Śudra and a dasiputra I see nothing to prevent succession to the illegitimate son being traced by analogy to the rule laid down in verses 135 and 136 of Yajnavalkya as explained in Chapter II, Section 1 placitum 2 of the Mitakshara especially as the Hindu law recognises heritable blood between the Sudra and his dasiputra and Manu states that the father of every one of the classes of sons enumerated by him succeeds to the property of his heirless son." "The principles of Atidesa अतिदेश where by principles laid down with reference to one case are applied to other analogous case were recognised by Jaimini in his Mimamsa *Books VII and VIII of Jaimini Mimamsa.* I would for the foregoing reasons answer the question referred to in the affirmative."

The other judges of the Full Bench agreed with the conclusion and with the reasoning of the learned judge noted above.

(2) 5 Mad. H. C. R. 161. Scotland and Collett JJ.

"In the present case there appears to be no doubt that the daughters of the dancing woman like the parties to the suit take the place of sons and our decision founded upon this view of the law is that in the *absence of any further positive rule*, daughters must be regarded as sons and held to take estates of inheritance from the mother *similarly* to sons under the general law of inheritance."

(3) I. L. R. 11 Madras 393. Muthuswamy Ayyar and Parker JJ:—

"Another case to which we were referred at the hearing is 2 M. H. C. R. 196. Though it is no authority for the position that a dancing woman may adopt, it is clear authority to support the view that when the rival claimants are the adulterous issue of a Brahmin woman living with an Englishman, they may be considered as Hindus and their rights of inheritance *inter se* may be determined with reference to local custom or usage or the *analogies of Hindu law*.

(4) I. L. R. 25 Madras 519, Benson and Bhashyan Ayyangar, JJ.—

"The question and the only question is whether under the Mitakshara law, a divided brother of Sudra A who died intestate

without having legitimate male issue is entitled to succeed in preference to A's grandson, the legitimate son of A's predeceased illegitimate son.'

"There is no direct authority either in Hindu law texts or in judicial decisions applicable to the case. The question therefore has to be answered with reference to established principles and the *analogies* which have heretofore prevailed in like cases."

(5) I. L. R. 48 Madras, 944. Devadass and Wallace JJ :—

"If the Court holds that outside Hindu Law there is heritable blood between any two illegitimate children, will that heritability carry with it all the adjuncts of heritability so that the legitimate male descendants of one branch can claim as reversioners to oust the widows and legitimate descendants of the other branch? This is the point before us.......I cannot see that such an *analogical application of Hindu Law* to persons living as Hindus and following Hindu customs and usage can in any way offend equity and good conscience. I hold therefore that the *Legal Principles* to be applied are those set out above."

(6) I. L. R. 51 Bomb. 784, Fawcett and Parker, JJ :—

The question was whether under the Hindu Law a sister of a prostitute is entitled to succeed to the prostitute's property as a sapinda before the property goes to the Crown by escheat.

"The rule of Atidesa whereby principles laid down with reference to one case are applied to analogous cases was recognised by Jaimini in his Mimamsa. *Books VII and VIII of Jaimini's Mimamsa*. See Subramaniam *vs.* Ratnavelu, I. L. R. 41 Mad. 44. In considering therefore the right of a sister to succeed to a female prostitute, the texts relating to her right to succeed to sapratibandna daya of a male may be considered as applicable by *analogy* viz., the text of Manu Chap. IX verse 187. If the analogies of Hindu Law are applied to a prostitute mother the particles of the mother's body abound in them and they are sapindas of each other because they are connected with each other through the body of the mother."

(7) I. L. R. 58 Bomb. 119, Shinge J. :—

The principles decided in I. L. R. 51 Bomb. 784 were quoted and applied to the case of two persons who could not be regarded as brother and sister in the proper sense of the term inasmuch as they were offspring of an adulterous connection.

(8) I. L. R. 17 Madras, 422. Muthuswami Ayyar, and Davies, JJ.:—

In the case of disputed succession to impartible property between sons who are born of the same caste but of different classes thereon, the right of a junior son by a first married wife,

if she be of higher class is superior to an elder son of a wife by a lower class.

"*Looking again to the ancient Hindu Law we find an analogy* in anuloma marriage......Thus the *rule deducible by analogy* from this branch of Hindu Law is one of preference in favour of the son by a wife of the same caste or rank."

(9) P. C. Tagore *vs.* Tagore, 1872, 1. I. A. Sup. 47 :—

"The law of wills has therefore grown up so to speak naturally from a law which furnishes no analogy but that of gifts and it is *the duty of a tribunal* dealing with such a case now in the instance to be governed by the established principles and the analogies which have heretobefore prevailed in such cases."

Their Lordships refer to the opinion of Lord Wensleydale: "The rule of Jurisprudence in new cases was stated by Lord Wenslydale in the opinion decided by him as a judge of the House of Lords in the case of Morehouse *vs.* Pennall 1 Clark and Finnely in accordance with principles generally recognised."

"This case said Lord Wensleydale therefore is in some cases new as many others which continuously occur but we have no right to consider it, because it is new, as one for which the law has not yet provided at all; and because it has not yet been decided to decide it for ourselves according to our judgment of what is right and expedient. Our common-law system consists in applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents and for the *sake of attaining uniformity consistency and certainty we must apply those rules where they are not plainly unreasonable and inconvenient to all cases which arise; and we are not at liberty to reject them and to abandon all analogy to them in those to which they have not yet been judicially applied because* we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to us to be a great importance to *keep this principle steadily in view* not merely for the determination of this particular case but for the *interests of law as a science*."

(10) I. L. R. 33 Bomb. 669. Chandravarkar J. delivered the judgment of the Bench (Chandravarkar and Heaton JJ)

"The Subordinate judge has adopted for a basis of his decision the analogy of the Roman Law on a point as a guide under the circumstances as if the Hindu Law were barren of light on the subject. The Hindu Law is a jurisprudence by itself and contains within its limits all the principles necessary for application to any given case. It is doing scant justice to Hindu Law as a science to suppose that because there is no express text providing for a concrete point arising for adjudication, therefore, there is nothing

in it to guide a judge in deciding that point and that he must import analogies from foreign law to help him."

"The Hindu Lawgivers have not indeed laid down a rule in express terms on every conceivable point. But having provided for such cases as had arisen before or in their time, they left others to be determined either with reference to certain legal principles laid down by them in clear terms or by the *analogy of similar cases governed by express texts.* Had the Subordinate judge gone into the question a little more carefully than he seems to have done he would have found that there was *no need of Romanising the Hindu Law* for the purpose of his decision."

"Analogy is a useful weapon but it must be cautiously applied."[4] Mill[5] describes it as follows: "two things resemble each other in one or more respects; a certain proposition is true of the one and therefore it is true of the other." The accuracy of the conclusion drawn will depend on the relative importance of the resemblances and the unimportance of the differences between the two things—the situation being analysed from the point of view of the proposition which it is desired to establish.[4] In life we find almost every degree between actual identity and remote resemblance and a supporter of an analogy will emphasize the points of resemblance while an opponent will maintain that the differences are crucial.

Appendix

MEANING OF DHARMA IN THE LAW OF PROCEDURE

The law to be administered is the Dharma Śastra. The procedure to be followed in the trial of cases is laid down in the following ślokas of Narada.

धर्मश्च व्यवहारश्च चरित्रं राजशासनम् ।
चतुष्पद्व्यवहारोऽयं उत्तरः पूर्वबाधकः ॥
तत्र सत्ये स्थितो धर्मः व्यवहारस्तु साक्षिषु ।
चरित्रं पुस्तकरणे राजाज्ञायां तु शासनम् ॥

The meaning of these ślokas had been the subject matter of different interpretations by different scholars. In one view it was held that *Dharma* referred to moral law or rules of justice, equity and good conscience and *Vyavahara* referred to civil law as laid down by the Smritis and that *Dharma* was superseded by *Vyavahara*.

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4 Paton—*A text book of Jurisprudence,* 1948 page 166.
5 Mill—*A System of Logic,* 1897 ii. 88.

This view has been given great currency by Srinivasa Ayyangar accepting the same.[1]

The difficulty of interpretation has been fully realised by Srinivasa Ayyangar when he says: "The difficulty in understanding the exact meaning of this rather obscure verse without the light thrown upon it by Katyayana's verses is to be seen in the different attempts at interpretation made by Dr. Shama Sastri, Mr. Jayaswal and N. N. Law" and we may add that the difficulty is none the less reduced even with the help of Katyayana and Artha Śastra when we note the different interpretations given by Dr. Jolly and Dr. Shama Sastri to the verses in Artha Śastra and Narada.

Sir S. Varadachariar in his *Hindu Judicial System* has exhaustively dealt with the subject.[2] The conclusion arrived at by Sir S. Vardachariar is stated as follows :—

"When it came to Katyayana to deal with those four terms which seem to have acquired some importance by their antiquity and repetition he made it clear that *Dharma-nirnaya* signified disposal of a dispute on the admission of the defendant who desired to stick to Dharma. *Vyavahara* was disposal in the regular course after the parties had joined issue and *Charitra* was disposal in accordance with the usage of the community whether it be in conformity with the Śastra or opposed to it. *Rajaśasana* was the king's order; but it was not expected to be opposed to Nyaya Śastra or to the usage of the community. He repeats the principle about the 'latter displacing the earlier' and adds that where the position is reversed justice will be destroyed.

"Brihaspati proceeds to explain the sense in which he is using the four terms. *Dharma*, *Vyavahara*, *Charitra* and *Rajaśasana*. *Dharma* stands for Dharmanirnaya which is of two kinds: (*a*) adjudication with reference to probabilities on the admission of parties or on their oaths. and (*b*) adjudication as a result of ordeal. *Vyavahara* means adjudication on the evidence of witnesses and documents. *Charitra* means (*a*) adjudication on circumstantial evidence and (*b*) adjudication based on Usage. *Rajaśasana* is an adjudication by the king without the aid of the aforesaid means or in defiance of the Śastras or of the advice of the Sabhyas. Having given his own definition of the four terms, Brihaspati lays down some rules whose general result is that a decision based on evidence is preferable to one based on ordeal, that even the consequence of the result of the evidence (under the

1 Mayne's Hindu Law 10th edition revised by Srinivasa Ayyangar pages 15 and 16 and other pages in the three chapters on the Sources of Hindu Law—11th En p 14-15.

2 Radha Kumud Mookerjee Lectures, 1945, Lucknow. Section 35. "The Rule of Decision" pages 125 to 135.

ordinary law) must give away to special usages and the king may, if he thinks it proper, pronounce a decision even in disregard of usage. The conception of Badhyabadhaka-bhava is not really one of superiority or inferiority but only the principle that when occasion has arisen for a decision to be given on any of the later-enumerated of the four bases, a decision on any of the earlier enumerated bases will not be appropriate."

Mm. P. V. Kane[3] has arrived at the identical meaning of the four expressions *Dharma*, *Vyavahara*, *Charitra Rajaśasana* as given by Sir S. Varadachariar. Mm. Kane states:

"Dharma and the other three are really the four feet of निर्णय—final decision which is one of the four stages of a law suit (Vyavahara) and so only in a secondary or far-fetched sense they are the four padas of Vyavahara.

A decision is said to be arrived at according to *Dharma* when the wrong-doer admits his guilt or wrong-doing and the real owner secures his wealth or the relief due to him without having to undergo the trouble of a protracted trial by means of witnesses, document etc. Similarly a decision to be arrived at by ordeals is said to be one by *Dharma*.

When a litigation is fought out in Court by citing witnesses, the decision is said to be by *Vyavahara*. Witnesses are mentioned only by way of illustration and imply documents, possession and other means of proof.

Charitra means the usage of a country village or family. Usages are the means of decision whether they are supported by Smritis or not. चरित्रं पुस्तकरणे means that such usages are valid means of decision if they have been written down or recorded by the King[3] while the reading in Paraśara Madhaviya चरित्रं तु स्वीकरणे means usages become the rule of decision when they are accepted as valid by the people and the courts.

When a king issues in a matter of dispute an order which is not opposed to Smritis or local usages and which is thought out as the most appropriate one by the King's intellect or which is issued to decide a matter when the authorities on each of the two sides are equally strong, it is a decision by royal command.

Some examples may be given. If one litigant says that he would prove his case by an ordeal, while the other says he will prove his contention by human means (documents or witnesses) then the trial by the ordeal is not to be resorted to but the hearing of the case is to proceed in the ordinary way. Vide Katyayana quoted by *Mitaksara* on *Yajnavalkya* II. 22 for this rule. Here *Dharma* is set aside in favour of *Vyavahara*.

3 *History of Dharma Sastra*, 1946, Vol. III, pages 260 to 262.

Another example is given in the Paraśara Madhaviya.[4] A person belonging to one of the four varnas commits a seditious act राज-द्रोह and through timidity admits his guilt (this is सत्य) but the witnesses deny that he was guilty of the act and he is let off. Here *Dharma* is set aside in favour of *Vyavahara* (trial based on the deposition of witnesses).[5]

Suppose a person is charged with the offence of adultery with the wife of an आभीर and the fact is established by witnesses. Yet the man charged may show that among the Abhiras there is a usage written down (in the census records of the king) that adultery with an Abhira woman is not punishable. In such cases *Charitra* (usage) annuls the ordinary *Vyavahara* but suppose that in such cases the king in order to improve the morals of a section of his subjects issues a proclamation that from the date of proclamation one who is guilty of adultery with an Abhira woman will be punished, then in that case usage will be set aside by royal command which will then be the rule of decision. Similarly, where there are no witnesses nor documents nor possession and no room for ordeal and there are no texts or local usages, it is the king who has to decide as best as he can".

The unanimous conclusion arrived at by both the scholars would make the meaning of the four terms given in the section on four sources of Vyavahara law in Mayne being superseded by the correct interpretations by Sir S. Varadachariar and Mm Kane. So also the view based on the above that the king made Dharma or interfered with Dharma would have to be abandoned. The inference from *Artha Śastra*[6] that the king's edicts when they they were of permanent value and of general application were probably embodied in the Smritis is not correct. The said book covers instructions for drafting the King's orders and correspondence agreeing with the Secretariat drafting department in modern days. Even Asoka's edicts never interfered with the Dharma of the land.[7]

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4 Vol. III. page 18.

5 Vide *Smriti Chandrika* Vol. II. page 11.

6 Mayne's *Hindu Law* 10th Edition basing the view on *Artha Śastra* Chapter X Book II. See. 11th edition, page 15.

7 That no animal shall be killed or sacrificed in Rock Edict I did not interefere with the Vedic sacrifices is the opinion of Professor K. V. Rangaswami Ayyangar. Vide his *Edicts of Asoka* 1950, Adyar. We may compare the modern instance of a curfew or black-out order and this could not be interpreted as an order prohibiting Samdhya or Agnihotra of a Brahmana. The order is universal and not special. The order is intended to remedy an entirely different state of affairs.

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